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A SELECTION
OF
LEADING CASES
ON
REAL PROPERTY, CONVEYANCING,
AND THE
Construction of Wills and Deeds:
WITH NOTES.

BY
OWEN DAVIES TUDOR,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER AT LAW,
Author of "A Selection of Leading Cases in Equity."

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TO
SIR RICHARD BETHELL, M.P.,

Her Majesty's Solicitor General,

WITH THE GREATEST RESPECT
NOT ONLY FOR HIS
HIGH ATTAINMENTS AS AN ADVOCATE AND LAWYER,
BUT ALSO FOR
HIS UNCEASING EFFORTS
IN THE PROMOTION OF LEGAL EDUCATION
AND OF ALL
REALLY GREAT AND SYSTEMATIC REFORMS OF OUR LAW,

This Work

IS

(WITH PERMISSION)

DEDICATED BY

THE AUTHOR.



PREFACE.

THE selection of Leading Cases in Equity having been favourably received in this country, and also in the United States, where it was edited by two distinguished Members of the American Bar,* the present selection of Leading Cases on Real Property, Conveyancing, and the Construction of Wills and Deeds, has been made, to which Notes are appended in the same method as that adopted in the Leading Cases in Equity.

In so wide a field as that chosen for the subject of this Work, the Author has carefully endeavoured to select all those Cases the knowledge of which is of the greatest importance to the Real Property Lawyer and Conveyancer; and he ventures to hope that the Notes, as well as the Cases, may be found useful both to the Student and Practitioner.

16, OLD SQUARE, LINCOLN'S INN,
January, 1856.

* Mr. (now Mr. Justice) John Innis Clark Hare and the late Mr. Horace Binney Wallace.



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CORRIGENDA.

- Page 18, in the third line from the bottom of the page, for "way-going," read "going."
- " 30, in the eighth line from the bottom of the page, for "therein," read "in"
- " 31, in the seventeenth line from the bottom of the page, for "no," read "in"
- " 39, in the fifteenth line from the bottom of the page, omit "however."
- " 69, in the eighth line from the top of the page, for "a tenant for life after p of issue extinct," read "tenant in tail after possibility of issue extin"
- " 255, in the eighth line from the bottom of the page, for "road," read "rood"
- " 631, in the sixth line from the bottom of the page, for "feoffee," read "feol"
- " 640, in the fourth line from the top of the page, for "case of a tenant," read a tenant.
- " " in the sixth line from the top of the page, for "before," read "after."
- " 648, in the nineteenth line from the top of the page, for "be," read "is."
- " 651, in the thirteenth line from the top, after the word "intention," insert "must when discovered be followed)," and omit the same words in line.
- " 778, in the first line of the head-note, for "gift," read "estate."

LEADING CASES
ON
REAL PROPERTY, CONVEYANCING,
AND THE
Construction of Wills.

ROUSE'S CASE (a).

Mich. 30 Eliz.

[REPORTED OWEN, 27.]

TENANT AT SUFFERANCE.]—*Tenant pur autre vie of a manor continues and holds the same after the death of the cestuy que vie:—Held, that as he came in by right he was, after the death of cestuy que vie, tenant by sufferance, and not a disseisor.*

Semble, that any grants made by him are good, inasmuch as he is dominus pro tempore.

IT was moved in this case, that if tenant for term d'auter vie does continue and hold his estate after the death of cestuy que vie, if he be a disseisor, and whether in pleading, the plea ought to be seised and not possessed.

Shuttleworth.—He was legally in at first, and therefore cannot be a disseisor, 15 Edw. 4, 41. A freehold could not be gained where he came in by the agreement of the party, and 12 Ass. 22. Where the husband and wife were seised of a freehold, and after were divorced by suit on the woman's part, whereby the woman is to have all the land, yet if the husband continue in possession and dies seised, this descent shall not take away entry, because he was no disseisor.

(a) See *S. C. nom. Rous v. Artois*, 2 Leon. 45; Mo. 236.

Gaudy.—He is tenant at sufferance and no disseisor; and was moved, that if tenant at sufferance, or a disseisor, make copyhold lands, if they be good or voidable:

Wilde took here a diversity between a termor that holds over tenant at sufferance; for in the case of a tenant at sufferance, no freehold taken from the lessor which the continuance of possession doth not take from him, but where the tenant holds over his term the freehold is disturbed, and therefore there is a disseisin: that present it seemed to the judges that there was no diversity.

Godfrey, however, in the next term moved, that if ten another's life held over his estate he had a fee simple; and he said that it was otherwise in some cases, for if he claim to be tenant at will of the lessor he shall not gain a fee simple. For Littleton chapter of Releases, 108, saith, that tenant at sufferance is when a man in his own wrong doth convey lands and tenements at the will of another that hath the freehold, and such occupier claimeth nothing but a tenancy at will. But in this case the tenant claims otherwise than at the will of the lessor, he does not claim anything at the will of the lessor, as in the case of Littleton, but claims to hold over against the will of the lessor, which is no tenancy at sufferance. And 10 Edw. 4, if a man makes a lease at will, and the lessor dies, and he continues and holds, the heir shall have a mortdancestor. And 18 Edw. 4, if a cestuy que use dies, and the tenant continues in, and the tenant is impleaded, the lessor shall not be received, and the reason is that there is no reversion in him, but the tenant hath it. And 22 E. 3, by Hussey, Justice, if a termor holds over his term, the estate in fee is confessed to be in him by matter of law; but there is doubt whether he be a disseisor or not, but it seemeth not that trespass does not lie against him before regress. And in the 7 E. 4, if a guardian holds the possession at the full age of the tenant for years after his term expired, the estate shall be adjudged to him in fee. And in our case he hath not claimed to hold at will, for he hath done contrary, for he hath made copies.

By all the Justices.—If tenant at will, or for years, or at sufferance make a lease for years, this is a disseisin, and a tenant at will thereby gain a freehold, and thereby doth claim a greater estate than he ought, and so it is in this case.

2. Admitting him to be tenant at sufferance, the question is if he may grant copies, and whether they be good; and it seems he may, for no trespass lies against him, because he is dominus pro tempore; and it is not like a copy made by an abator or disseisor, for it hath been adjudged that copies made by them are void; but in this case his act of making copies agrees with the custom, as in *Grisbrook's Case*. If an administrator sells goods, and pays debts with the money, and after he who is executor proves the will, he shall never avoid this sale, for that it was done according to the will, which the executors were compelled to do. So in the 12 H. 6, if a bailly cuts trees and repairs an ancient pale, this is good; and 6 R. 2, if he pays quit rents it is good.

Coke.—He comes in by right, and therefore is tenant at sufferance, and like this case is Dyer, 35 H. 8, 57, *Lord Zouche's Case*, where cestuy que use for life, the remainder over in tail, made a lease for the term of the life of the lessee, and died, and the lessee continued his estate, the opinions of the justices of both benches were, that he was but tenant at sufferance.

Popham.—If a manor be devised, and the devisee enters and makes copies, and then the devise is found to be void, yet the copies of surrender made by such devisee are good: but contrary where new or voluntary copies are made by him, 7 Eliz. And in the *Lord Arundel's Case* a feoffment in fee was made of a manor upon condition, the feoffee upon condition grants voluntary copies, those are good.

Atkins.—On the contrary, made a difference between a tenant at will and a tenant at sufferance, for a tenant at will shall have aid, but so shall not the other, as in 2 H. 4; and a release to one is good and to the other not, &c. And when he holds over he doth assume an interest which shall not be thought wrongful, for he is neither abator nor disseisor, and therefore dominus; and therefore the copies made by him are good, 4 H. 7, 3. Tenant at sufferance may justify for damage feasant.

And all the Justices held for the plaintiff, and that he that made the copy was but tenant at sufferance, and not disseisor, and that he had no fee. And the judgment was to be entered, unless the defendant showed better matter.

RICHARDSON v. LANGRIDGE.

Nov. 9, 1811.

[REPORTED 4 TAUNT. 128.]

TENANT AT WILL—FROM YEAR TO YEAR.]—*If an agreement made, to let premises so long as both parties like, and reserve compensation, accruing de die in diem, and not referable to a year or any aliquot part of a year, it does not create a holding year to year, but a tenancy at will, strictly so called.*

And although the tenant has expended money on the improvement of premises, that does not give him a term to hold until he is injured.

If, however, there were a general letting at a yearly rent, though payable half-yearly, or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year

TRESPASS for breaking and entering a stable of the plaintiff, breaking to pieces the doors and locks, and tearing down, damaging and destroying the bins, troughs and mangers of the plaintiff, locking up the stable and expelling the defendant from his possession. The defendant pleaded, first, not guilty; secondly, that R. Croft, being seised in fee of the premises, by indenture demised to the defendant, among other things, the stable, for a term of twenty years yet unexpired, by virtue whereof the defendant entered and possessed, and by reason of such possession justified the acts complained of in the declaration. The plaintiff, confessing the seisin of Croft and the lease to the defendant, replied that the defendant after and during the said term of twenty-one years, demised to the plaintiff the said stable with the appurtenances, to hold to the plaintiff for a certain term, that is to say, for so long a time as they the plaintiff and the defendant should respectively please, the plaintiff rendering to the defendant a certain compensation between them in that behalf agreed upon for the same, by virtue of which demise the plaintiff entered and was possessed, until the defendant afterwards and

the continuance of the said term and interest of the plaintiff therein of his own wrong committed the said several trespasses. The defendant, apprehending that the demise laid in the plea was descriptive of a holding from year to year, instead of rejoining that he had determined his will, rejoined that he *did not demise* the said stable to the plaintiff in manner and form as the plaintiff had alleged, and tendered issue thereon, in which the plaintiff joined. Upon the trial of this cause, at the Maidstone Summer Assizes 1811, before Lord Ellenborough, C. J., the evidence was, that the defendant having taken a lease of a close of land, and built a shed therein, in August 1810, let the same by parol to the plaintiff, who was a carrier, upon an agreement made without any reference to time, that the plaintiff should convert it into a stable, and that the defendant should have all the dung made by the plaintiff's horses. The plaintiff, after having for some time occupied it in its original state, laid out about six pounds in putting up a rack and manger and converting the building to a stable. About the end of the following April the defendant requested him to leave the premises, and upon his refusing to do it till he could suit himself elsewhere, the defendant, in the plaintiff's absence, and without having given him any written notice to quit, forced open the door, took down the rack and manger and carried it out of the stable, and took and used the manure which had been made upon the premises during the plaintiff's occupation of them, and which was of considerable value. The defendant's counsel contended that the evidence proved a strict tenancy at will (which, though it made good the defendant's case, the plaintiff by his replication himself alleged, and the defendant by his rejoinder denied), and that therefore the defendant was entitled at any time to determine his will, and to enter upon the premises and resume the possession when he pleased, without any notice to quit. The counsel for the plaintiff contended that this must be a yearly holding, or that at all events the defendant, having put the plaintiff into possession and suffered him to contract an expense by erecting a rack and manger, could not countermand the permission at his pleasure; upon the same principle on which, in the case of *Winter v. Brockwell*, 8 East, 308, it was held, that a licence once executed, if it be to do a thing whereby the party incurs expense, cannot be revoked, unless the grantor tenders to the grantee all the expense which he has incurred in executing the licence. Lord *Ellenborough*, C. J., thought that the demise, being so long as each party should respectively please, warranted the defendant

in putting an end to the holding when he pleased, and in evicting tenant without any notice ; whereupon the plaintiff, either not adverted to the terms of his issue, or probably fearing that, though he literally proved his issue and was entitled to a verdict thereon, the defendant would be entitled to judgment *non obstante veredicto*, submitted to a nonsuit.

Best, Serjt., on this day moved for a rule *nisi* to set aside the nonsuit and have a new trial. He first contended that there was on this day no such estate possible in law as a strict tenancy at will, where no longer term was defined, all was tenancy from year to year. At all events, the taking of the dung was equivalent to an acceptance of rent ; and after an acceptance of rent, a half-year's notice to quit was necessary : *Doe ex dem. Shore v. Porter*, 3 T. R. 16. Lord *Kent* C. J., says, "The tenancy from year to year succeeded to the tenancy at will, which was attended with many inconveniences. In order to obviate them the Courts very early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without receiving six months' previous notice." *Right, on the demise of Cutting, v. Darby*, 1 T. R. 163, *Buller* C. J., says, "The reason is (of the rule of law which construes what was formerly a tenancy at will of lands as a tenancy from year to year), that the agreement is a letting for a year at an annual rent : then if the parties consent to go on after that time, it is a letting from year to year." And again, at the moment the year began, the defendant had a right to hold to the end of that year ; therefore there should have been half a year's notice to quit before the end of the term. He also referred to the case *Winter v. Brockwell*, and urged that at least the tenant, having erected the rack and manger at a considerable expense, was entitled to a time long enough to indemnify him.

Mansfield, C. J.—That case has not the slightest resemblance to the present case. You must find some act of parliament, or some decision of the Courts, that two persons cannot agree to make a tenancy at will. But it is a maxim that *modus et conventio vincunt legem*. Have you any case where the Courts have declared that the law must be a tenancy from year to year, the parties having expressly agreed that the holding shall be so long as both parties please ? and of that there is evidence here. You say that Lord *Ellenborough* was

of opinion that the evidence did not prove a tenancy for a year : the nonsuit then must have proceeded on the ground that there was such an agreement as the plaintiff has himself stated. Here you speak all along of an indefinite agreement. If there were a general letting at a yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year. But if two parties agree that the one shall let, and the other shall hold, so long as both parties please, that is a holding at will, and there is nothing to hinder parties from making such an agreement.

Heath, J.—I am of the same opinion. It is said that an indefinite hiring of a servant is an hiring for a year, but those cases do not apply. That presumption is founded upon the universal custom of hiring servants at statute fairs, which is usually for a year (a). There is no custom that if a man lets premises to another he shall let them for a year.

Chambre, J., denied the proposition, that at this day there is no such thing as a tenancy at will ; the taking of the dung by the landlord gave the tenant no term in the premises. Surely the distinction has been a thousand times taken : a mere general letting is a letting at will ; if the lessor accepts yearly rent, or rent measured by any aliquot part of a year, the Courts have said, that is evidence of a taking for a year. That is the old law, and I know not how it has ever come to be changed. The Courts have a great inclination to make every tenancy a holding from year to year, if they can find any foundation for it, but in this case there is none such.

The Court refused the rule.

There is a difficulty sometimes in determining by what tenancy a person holds land, whether as tenant at will, tenant at sufferance, or tenant from year to year ; this principally arises from the tendency of the decisions of

(a) By the statute 5 Eliz. c. 4, s. 3, "No person shall be retained or hired to work for any less time than a year" in any one of the thirty trades therein mentioned ; and by s. 7, the persons therein described, being nearly all who are not either independent or

already employed in trade, are compellable to be retained to serve in husbandry by the year : probably the practice, which is well-founded in physical causes, depending on the revolution of seasons, was current long before the statute.

the Courts to raise by construction of law, where possible, an estate rather than by wrong, and an estate of certain duration rather than dependent on mere accident or caprice.

In order to illustrate these remarks, and to examine the decisions of the Courts upon this subject, it is proposed to consider—1. Tenancy at will; 2. Tenancy at Will; and 3. Tenancy from Year to Year.

1. *Tenancy at Sufferance.*

A tenancy at sufferance has been defined as the lowest estate which can subsist; it arises where a person has held by a lawful title, and continues in possession after his title has determined, without either the agreement or the disagreement of the person then entitled to it. *Watk. Convey.* 1 Morley, p. 23. Where, for instance, after the determination of a tenancy by will by the death of the landlord, or of a term of years by the death of the lessor who had merely a life interest, or by effluxion of time, the person in possession holds over, he will be tenant at sufferance, since his possession first was rightful. *Co. Litt.* 57 b; see *Butler v. Duckmanton*, *Cr.* 169; *Miller v. Muynnewaring*, *W. Jones*, 354; *Cro. Car.* 397.

So an undertenant who is in possession at the determination of the lease, and is permitted by the reversioner to hold over, is a tenant at sufferance. *Simpkin v. Ashurst*, 4 *Tyrw.* 781; 1 *Cr. M. & R.* 261.

It seems, however, that the heir of a tenant at sufferance would not succeed his ancestor in the tenancy, because he would not, according to the ordinary definition of the tenancy laid down in *Rouse's Case*, have a title by a lawful title. See also *Berry v. Goodman*, 2 *Leon.* 147; 1 *Perkins*, 3 *Mau. & Sel.* 271.

Against the crown there can be no tenant at sufferance, as any person holding over in the before-mentioned cases would be considered as a trespasser. *Co. Litt.* 57 b; *Doe d. Watt v. Morris*, 2 *Bing. N. C.* 194.

This tenancy cannot be either conveyed, assigned or demised (*Shopham v. Ryoler*, *Cro. Jac.* 55; and see 3 *East*, 451) so as to bind any one, except the tenant at sufferance himself, and moreover as it arises by construction and not by contract, and there is no privity between the landlord and tenant, it has consequently been held that a release from the former will not operate to enlarge the estate of the latter. *Butler v. Duckmanton*, *Cro. Jac.* 169.

This tenancy seems to have originated in a desire of the judges, by inserting it between two parties, to prevent adverse possession from arising, in a particular estate determined without the knowledge of the person entitled to the reversion. Thus if a tenant for a term of years held over after the expiration of the term, time would not run, under the statute of 21 James 1, c. 16, but would run from the end of the term, as the person remaining in possession would be considered as a tenant, and did not hold by an adverse title; and under that statute time would only run from the commencement of adverse possession. *Smartle v. Williams*, 3 *Lev.* 387; *Roe v. Ferrars*, 2 *Bos. & Pul.* 38; *Doe v. Hull*, 2 *Dowl. & Ry.* 38; see also *Fishar v. Prosser*, *Cowp.* 4, c. 27.

Now, however, the second and third sections of 3 & 4 *Will.* 4, c. 27,

done away with the doctrine of *non adverse* possession; and except in cases falling within the fifteenth section (which has now generally ceased to have any operation), the question is "whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession,*" per Lord Denman. *Nepean v. Doe d. Knight*, 2 Mees. & W. 911.

In *Rouse's Case* (selected as one of the principal cases at the head of this note) it will be observed, that it was held that grants of copyholds made by a mere tenant at sufferance were good, and this does not conflict with what has before been laid down, that a tenant at sufferance cannot convey his estate, because the validity of grants of copyholds by a tenant at sufferance depends upon their being merely ministerial acts. 1 Scriv. Cop. 96, 97.

Formerly the only mode in which the owner of the estate could proceed against a tenant at sufferance so as to obtain possession thereof, was by entry upon the land and ouster of the tenant by ejectment (in which entry was supposed), or after actual entry, but not before, by action of trespass (Co. Litt. 57 b; *Trevillian v. Andrew*, 5 Mod. 384); and the tenant was not entitled to emblements (7 Mees. & W. 235), but he was not liable to pay any rent, inasmuch as it was considered to be the fault of the owner to suffer him to remain in possession of the estate after the determination of his interest, when he had an easy remedy in his own hands. But now by 4 Geo. 2, c. 28, every tenant for life or years, or other person claiming under or by collusion with such tenant, who shall wilfully hold over after determination of the term, and *demand* made in writing of delivery of possession by the landlord or him in reversion or remainder, is made liable to the payment of double the yearly value of the lands detained. It will be observed that this statute only took in cases in which the landlord gave notice to quit, and therefore the deficiency was supplied by 11 Geo. 2, c. 19, which extends the provision for double rent, to the holding over, after the *tenant's* giving notice to quit (Co. Litt. 57 b; Harg. note 2). As to these statutes, see *Wilkinson v. Colley*, 5 Burr. 2694; *Cutting v. Derby*, 2 Black. 1075; *Cobb v. Stokes*, 8 East, 358; *Doe v. Roe*, 5 Barn. & Ald. 766; *Messenger v. Armstrong*, 1 T. R. 53; *Doe v. Roe*, 7 Bar. & Cress. 2; *Page v. More*, 15 Q. B. 684; and see as to further remedies against tenants holding over, 1 & 2 Vict. c. 74, and 9 & 10 Vict. c. 95, s. 122, which gives jurisdiction to the County Courts where the value of the premises, or the rent payable in respect thereof, does not exceed 50*l.* per annum, upon which no fine shall have been paid; see also *Wickham v. Lee*, 12 Q. B. 521. And see 6 Anne, c. 18, s. 5, against holding over by guardians or trustees of infants, and by husbands seised in right of their wives, and by all others having particular estates determinable on any life or lives.

2. Tenancy at Will.

A tenancy at will may be defined as an estate in land, determinable at the will either of the landlord or tenant (Co. Litt. 55 a). Thus in the case put by Littleton "if lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which he is in posses-

sion," a tenancy at will is created between the parties (Litt. sect. 68); for law will imply the lease to be at the will of the lessee, as well as at the will of the lessor. So likewise if the lease be made to have and to hold at will of the lessee, it will also be at the will of the lessor. And it must always be remembered that a lease at will must in law be a lease at the will of both parties. Co. Lit. 55 a.

A tenancy at will may be created, as in the principal case of *Richardson v. Langridge*, by express words (*Cudlip v. Rundall*, 4 Mod. 9; *Doe v. Basto v. Cox*, Q. B., 17 L. J. 3); it may also arise by implication (7 M. & W. 235); and if a person be in possession of land, in which he has freehold estate, nor tenancy for any certain term, and which nevertheless he holds by the consent of the true owner, that person is tenant at will (*Smith*, L. C. 76 a). Thus where a person is put into possession of property paying no rent, as in the case of a minister put into possession of a house by trustees of a congregation (*Doe v. Jones*, 10 B. & Cress. 718; *R. v. Clapp*, Russ. & Ry. C. C. 498; *Wilkinson v. Malin*, 2 Tyrw. 544; *Doe v. Nicholl v. M'Kaeg*, 10 B. & C. 721; sed vide *Burton v. Brooks*, 11 C. 41); or a person enters under a contract for a purchase or a lease, although he may in the latter case have paid interest (*Doe v. Tomes v. Chamberlain*, 5 Mees. & W. 14) if he have paid no rent (which as we shall hereafter see would raise by construction a tenancy from year to year), (*Regnart v. Peter*, 7 Bing. 451; *Doe v. Miller*, 5 C. & P. 595; *Riseley v. Ryle*, 11 M. & W. 16), or if the owner assents to the possession of tenant at sufferance (*Doe v. Turner*, 7 Mees. & W. 235, 646), he will be a tenant at will.

As a vendor who remains in possession after a conveyance is not necessarily in possession with the consent of the vendee, he will not be a tenant at will. *Tew v. Jones*, 13 Mees. & W. 13.

Unless there be a contract that a tenant at will is to occupy rent free (*Howard v. Shaw*, 8 Mees. & W. 118, 123), he will be compelled to make compensation in an action for use and occupation (Ib. and see *Ibbs v. Richardson*, 9 A. & E. 849); but not if the occupation has not been beneficial, nor a fortiori if it have occasioned loss. *Hearn v. Tomlin*, 1 Pea N. P. C. 252; *Kirtland v. Pounsett*, 2 Taunt. 145.

Where a party who contracts for the purchase of landed property is prevented from completing the purchase by the vendors failing to make a good title, he is not liable in respect of the time of his holding in the expectation that such title would be made, and the purchase completed (*Winterbottom v. Ingham*, 7 Q. B. 611); but when the contract is at an end, as he continues tenant at will, he is liable to be sued for compensation. *Howard v. Shaw*, 8 Mees. & W. 118, 123.

The question sometimes arises what is the interest which at law a mortgagor in possession may be considered to hold. It seems that if he remains himself in the occupation of the estate, and there be an agreement in the mortgage deed, that he is to continue in possession until default in payment of the mortgage money at a certain period, he will be tenant for a term by re-demise (*Wilkinson v. Hall*, 3 Bing. N. S. 508); but if the mo

be not paid at the time fixed, he becomes and may be treated as a tenant at sufferance: "from the day on which the mortgagor fails to redeem his pledge," observes Best, C. J., "the possession belongs to the mortgagee, and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day is precisely the same." *Doe d. Fisher v. Giles*, 5 Bing. 427.

Where there is no express or implied agreement as to the possession, the mortgagor will be tenant at sufferance (*Thunder v. Belcher*, 3 East, 451); but upon the mortgagee assenting to his possession he will be tenant at will, but that tenancy would be determined by a transfer of the mortgage without the consent of the mortgagor, who would thereupon, until payment of interest, be tenant at sufferance to the transferee. *Watk. Convey.* by Morley, Coote & Coventry, 14.

By the death either of the mortgagor or mortgagee the tenancy at will would be determined, and in the latter case a tenancy at sufferance; in the former, on the entry of the heir or devisee of the mortgagor without the consent of the mortgagee, an adverse possession would commence, until by payment of interest or otherwise, he recognized the title of the mortgagee, whereupon a tenancy at will would arise (*Holland v. Hatton*, Carth. 414; 10 Vin. Abr. 418, pl. 19). The mortgagor under an agreement that he shall retain possession until default, and that the mortgagee shall have interest, has no implied authority to let from year to year; hence a mortgagee may recover in ejectment without giving notice to quit, against a tenant who claims under a lease from the mortgagor, granted after the mortgage without privity of the mortgagee (*Keech v. Hall*, Douglas, 21); if, however, he recognize the tenants they will become his own, and he cannot treat them as trespassers (*Whitaker v. Hales*, 7 Bing. 322; *Birch v. Wright*, 1 T. R. 378). The mere receipt, however, of interest by the mortgagee, will not, of itself, amount to a recognition of the tenancy (*Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473; *Doe d. Bowman v. Lewis*, 13 Mees. & W. 241). See, however, the remarks of Lord Denman in *Evans v. Elliot*, 9 Ad. & Ell. 342.

Where the mortgaged estate is in the occupation of tenants, and there is no agreement in the mortgage deed, by which the mortgagor is empowered to receive the rents until default, there does not appear to be any tenancy between the mortgagor or mortgagee, and the former is merely a receiver without liability to account. *Watk. Convey.* 14, note by Morley.

Where the legal estate is in trustees, and the cestui que trust is in possession, he may, although the owner in equity, be considered at law as tenant at will to the trustees; the same tenancy would probably be raised between their successors, in case of the death of the parties; the possession being referred to an implied agreement. *Watk. Convey.* by Morley, Coote & Coventry, 16; *Garrard v. Tuck*, 10 C. B. 231. *

Although a mere general letting may be considered to create a tenancy at will, nevertheless, as is laid down in the principal case of *Richardson Langridge*, the Courts have a great inclination to construe every such letting as creating, by implication, a tenancy from year to year if they can find sufficient foundation for it; as, for instance, the acceptance by the lessor, a yearly rent, or rent measured by any aliquot part of a year, which is considered as evidence of a taking for a year. See post, p. 14.

Determination of Tenancy at Will.

As we have before seen, either party may determine the tenancy, we now consider in what manner they may do so.

The lessor may determine the will by actual entry (Co. Lit. 55 b), or express notice to the tenant to occupy the land no longer, *Goodtitle Herbert*, 4 T. R. 680; *Doe d. Jones v. Jones*, 10 B. & C. 718; and the case of *Doe d. Price v. Price*, 9 Bing. 356, where the attorney the lessor wrote to the attorney of the lessee at will saying, that unless paid what he owed, the lessor would, without delay, take measures for recovering the possession of the property, it was held by the Court of Common Pleas a sufficient determination of the will.

It will also be put an end to by various acts from which the dissent of the lessor to the continuance of the tenancy may be implied, as by an ordinary conveyance of which the tenant has notice, or by a feoffment with livery seisin where notice to the tenant will be implied (*Dinsdale v. Iles*, 2 Lev. 8; *Ball v. Cullimore*, 2 Cr. M. & R. 120), or an agreement to sell the property to the tenant (*Daniels v. Davison*, 16 Ves. 252); but an ordinary conveyance without actual notice will not affect the tenant until he has notice (*Doe d. Davies v. Thomas*, 6 Exch. 857). Where the lessor becomes insolvent, the vesting order with knowledge thereof by the tenant is a determination of the will, *Doe d. Davies v. Thomas*, 6 Exch. 854.

Again, the entry of the lessor on the land and his cutting down trees (Co. Litt. 55 b), or putting in his cattle (Ib.), will determine the tenancy inasmuch as such acts, unless permitted by the contract creating the tenancy would, if a determination of the tenancy were not implied, place the lessor in the place of a wrongdoer. Thus in the case of *Turner Doe d. Bennett*, 9 Mees. & W. 643, where the landlord entered upon the land in the hands of a tenant at will and cut a drain without consent. It was held that this amounted to a determination of the will. "The intent," said Lord Denman, C. J., "of an entry is undoubtedly in many cases important, but in the case of a tenancy at will, whatever be the intent of the landlord, if he do any act upon the land, for which he would otherwise be liable to an action of trespass at the suit of the tenant, such act is a determination of the will, for so only can it be a lawful and not a wrongful act. . . . It is clear, in this case, that an action of trespass would have lain against the lessor of the plaintiff at the suit of the defendant for the cutting of the drain, which was done by his permission and authority after the defendant had refused to allow it, unless that act be referred to the

right of the lessor of the plaintiff to enter and determine the will at any time. The act must, therefore, be referred to such right, and the tenancy at will was clearly determined. See also *Doe d. Bennett v. Turner*, 7 Mees. & W. 226.

So if the landlord makes a lease to commence in futuro, the will determines upon the commencement of the lease (*Dinsdale v. Iles*, Raym. 224; *Hinchman v. Iles*, 1 Ventr. 247); where, however, the entry of the landlord, or any act done upon the land, is not inconsistent with the tenancy; as, for instance, if he entered and cut a drain or fell timber with the consent of the tenant (*Turner v. Doe d. Bennett*, 9 Mees. & W. 643), or if he cut down timber excepted out of the lease, the will would not thereby be determined. Co. Litt. 55 b, Com. Dig., Estates by Grant, H. 6, H. 7, H. 8.

The death either of the lessor or lessee will determine the tenancy (*James v. Dean*, 11 Ves. 391); but this will not be the result of the marriage of a female lessor (Co. Litt. 55 b), nor of the death of her husband after the husband and wife had made a lease at will of the wife's land (Ib.); so where there are two lessors or two lessees, the death of one of the lessors or one of the lessees will not put an end to the tenancy. Co. Litt. 55 b.

The lessee may determine the will by saying that he will hold no longer, if he also give up possession but not otherwise (Ib.). He may likewise do so by any act inconsistent with his interest, as by a lease, grant or an assignment, which will be binding as against himself only (*Doe v. Carter*, 9 Q. B. 865); but in all these cases notice to the lessor is indispensable. *Jones v. Clerk*, Hard. 47; *Birch v. Wright*, 1 T. R. 378; *Carpenter v. Collins*, Yelv. 73; *Pinhorn v. Souster*, 8 Exch. 763. See also 1 Co. Litt. 55 b, 57 a.

Where a tenancy at will is determined, the tenant thereupon becomes a mere trespasser, or a tenant at sufferance, per Lord Denman in *Turner v. Doe d. Bennett*, 9 Mees. & W. 646.

It may be here mentioned that as either party may at once determine the tenancy, a Court of Equity will not enforce specific performance for a mere tenancy at will. *Browne v. Warner*, 14 Ves. 156.

When Tenant at Will entitled to Emblements.

If the lessor oust the lessee, the latter will be entitled at common law to crops yielding an annual profit, which he may have sown, although not severed or ripe, on the determination of the tenancy. The reason is, that it would be injurious to the commonwealth that land should remain untilld; which would probably be the case, if lessors should, by determining the tenancy, be entitled to the crops (Co. Litt. 55 b). And a lessee will have liberty to come on the land to take off crops (Co. Litt. 56 a), or into a house to take away furniture, after the determination of the tenancy. Ib.; and see Litt. sect. 69.

But if the lessee at will himself determines the will, and refuses to occupy the ground, he will not be entitled to emblements. Co. Litt. 55 b; *Oland's Case*, 5 Co. 116.

A lessee at will, in the absence of any contract, is not liable for repairs (*Paine's Case*, 8 Rep. 86 a), nor for permissive waste (Litt. sect. 7; *Lady*

Shrewsbury's Case, 5 Rep. 13 b), though he is so for active or volu waste. 1 Co. Litt. 57 a.

3. Tenancy from Year to Year.

A tenancy at will or at sufferance, as we have already seen, is dependent upon the will of each party. A tenancy from year to year is of certain duration, it may arise either by express contract (as if A. lets land to B. to hold as tenant from year to year), or by implication or constructive law. Tenancies from year to year owe their origin to the inconvenience found to result from tenancies at will, which were only partially removed by the doctrine of emblements, and the Courts, at a very early period, raised an implied contract for a tenancy from year to year. Thus, as is laid down by Chambre, J., in the principal case of *Richardson v. Langridge*, although a mere general letting is a letting at will, yet if the lessor accords yearly rent, or rent measured by any aliquot part of a year, the Courts have said that is evidence of a taking from year to year, 13 H. 8, 15. *Doe v. Martin v. Watts*, 7 T. R. 85.

So if as laid down by Mansfield, C. J., there were a general letting of land for yearly rent, though payable half-yearly or quarterly, and though nothing were said about the duration of the term, it is an implied letting from year to year, ante, p. 7.

A person who having entered under an agreement to purchase, or afterwards goes off, or under a lease or an agreement for a lease, which for some cause or other is void, although at first he would only be a tenant at will, on payment of rent, by presumption or implication of law, he becomes a tenant from year to year. See *Clayton v. Blakey*, 2 Smith's L. 73 a, and note; *Martin v. Watts*, 7 T. R. 85; *Doe v. Tucker v. Moore*, 1 Barn. & Ad. 365; *Mann v. Lovejoy*, Ry. & Mood. 355; *Cox v. Bennett*, 1 Bing. 185; *Saunders v. Musgrave*, 6 Barn. & Cress. 524; *Chapman v. Tomner*, 6 Mees. & W. 100; *Berrey v. Lindley*, 3 Mann. & Gr. 49; *Riseley v. Ryle*, 11 Mees. & W. 16; *Doe v. Thompson v. Amey*, Ad. & Ell. 476; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; *In re Strotton*, 8 C. B. 502; *Doe v. Prior v. Ongley*, 10 C. B. 25.

The presumption arising from the payment and acceptance of rent is the same in the case of a corporation as an individual. *Doe v. Pennington v. Tanieres*, 12 Q. B. 998.

Payment of rent must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge* a party who had paid rent under an agreement of this description, but had not paid it with reference to a year, or any aliquot part of a year, was held nevertheless to be tenant at will only, per Parke, B., in *Braythwayte v. Hitchcock*, 10 Mees. & W. 497; *Doe v. Hull v. Wood*, 14 Mees. & W. 687.

Although the payment of rent is evidence of the intention of the parties to create a yearly tenancy, nevertheless where it appears by any instrument to be the express intention of the parties to create an estate at will, the pay

ment of rent, although under the provisions of the same instrument, will not create an estate from year to year. Thus in *Doe d. Basto v. Cox*, 17 L. J., Q. B., 3; 11 Q. B. 122, where A., under a mortgage deed, agreed to become tenant of B. of the premises demised, "henceforth at the will and pleasure of B., after the rate of 25l. 4s., payable quarterly;" it was held by the Court of Queen's Bench, refusing a rule for a new trial, that it was a tenancy at will, and that occupation for the two years, and payment of rent under the agreement, did not make B. tenant from year to year. "This Court," said Denman, C. J., "is desirous of presuming a yearly tenancy in all cases where the express language of the parties does not exclude such a presumption. Here, however, the parties distinctly say, that the tenancy shall be at the will and pleasure of the lessors." See also *Doe d. Dixie v. Davies*, 7 Exch. 89.

It is competent moreover to either the receiver or payer of rent to prove the circumstances under which the payments of rent were made, and by such circumstances to repel the legal implication which would result from the receipt of rent unexplained. *Doe d. Lord v. Crago*, 6 C. B. 90; *Woodbridge Union v. Colneis*, 13 Q. B. 269.

In the absence of contract, a term from year to year is assignable (*Botting v. Martin*, 1 Campb. Ca. N. P. 317); by the third section of the Statute of Frauds in writing (Ib.); and now by deed (8 & 9 Vict. c. 106, s. 3).

It seems that equity will not enforce an agreement for a tenancy from year to year, on the ground that legal damages are adequate by way of compensation. *Clayton v. Illingworth*, 10 Hare, 451.

Determination of a Tenancy from Year to Year.

A tenancy from year to year may be determined--1. By the determination of the interest of the lessor; 2. By surrender; 3. By notice to quit.

1. It is clear that where the interest of lessor, being limited as that of tenant for life, determines, the tenancy for years thereby also determines (*Symons v. Symons*, 6 Madd. 207); but under a recent act, 14 & 15 Vict. c. 25, the lessee may hold until the end of the current year.

When, however, the interest of the lessor is sufficient to confer such an estate, a tenancy from year to year will not determine by the death of a tenant, but will vest in his personal representatives. *Doe d. Shore v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 391; *Thompson v. Thompson*, 9 Price, 464.

2. A surrender by which the tenancy is determined may be express, in which case, by the 3rd section of the Statute of Frauds (29 Car. 2, c. 21), it must be in writing (*Mollett v. Brayne*, 2 Campb. N. P. C. 103; *Doe v. Ridout*, 5 Taunt. 519); and now by deed (8 & 9 Vict. c. 106, s. 3).

A surrender may also be by act and operation of law (and this is excepted from the Statute of Frauds); as, for instance, where the tenant takes a lease incompatible with the existence of his tenancy. Thus in the case of *Hamerton v. Stead*, 3 B. & C. 478, a tenant from year to year entered

into an agreement, during a current year, for a lease to be granted to him and A. B., and from that time A. B. entered and occupied jointly with him, it was held by the Court of King's Bench that by this agreement, and the *joint occupation* under it, the former tenancy was determined, although the lease contracted for was never granted.

An agreement, however, for a new lease, without the creation of a new tenancy, will not operate as a surrender. *Foquet v. Moor*, 7 Exch. 870.

3. A tenancy from year to year, when there is no stipulation on the subject, may be determined by either party giving a half-year's notice to quit to the other before the end of the current year of the tenancy (H. 8, 15 b; *Right v. Darby*, 1 T. R. 163), and a customary half-year is sufficient. Thus a notice on the 28th or 29th of September to quit on the 25th of March or at Lady-day is sufficient. *Roe d. Durant v. Doe*, 6 B. & C. 574; and *Doe v. Kightley*, 7 T. R. 63; *Howard v. Wemsley*, 6 Esp. 1; *Doe d. Mathewson v. Wrightman*, 4 Esp. 6; *Doe d. Harrop v. Greaves*, 4 Esp. 198.

Notice may be given by parol, unless by agreement it is required to be in writing (*Doe v. Crick*, 5 Esp. N. P. C. 197); it is, however, advisable to give it in writing.

The Courts will put a liberal construction upon notices to quit, and will hold them good notwithstanding there are inaccuracies therein, if they are not such as would be likely to mislead the tenant. Thus in *Doe v. Armstrong v. Wilkinson*, 12 Ad. & Ell. 743, notice was given to a year tenant to quit "that messuage, farm, &c., situated at Dunnington, in the county of York, which you now hold under me as tenant from year to year." The premises were not situated at Dunnington, but at Heslington. It was held, however, by the Court of King's Bench, on motion for nonsuit after verdict in an action of ejectment, that the notice was sufficient. "The alleged defect," said his Lordship, "was that the farm was described as being in the adjoining parish to that in which it really was. It was suggested that the tenant held more than one farm of the lessor, or was in any way misled by the error in the description; but it is contended that the plaintiff should have been called on to show negatively that the tenant was not misled; and that in the absence of such evidence he should have been nonsuited: we are of opinion that the learned judge was quite right in refusing to take that course. If he had been requested to put anything before the jury, he would have been right in asking them whether the tenant had in fact received an effectual notice, one that informed him of his landlord's intention to determine the tenancy." (See also *Doe v. Kightley*, 7 T. R. 63; *Doe v. Culliford*, 4 D. & R. 248; *Doe d. Cox v. —*, 4 Esp. 18.) But the Court will not, in order to support a notice, put a strained construction on terms which are clear in themselves. *Doe v. Morphet*, 7 Q. B. 577; and see and consider *Mills v. Goff*, 14 Mees. & W. 72.

A notice will be bad if it be merely alternative; as, for instance, when there is a notice to quit, "or that you agree to pay double rent" (Lord Mansfield, Dougl. 176); but if there be a notice to quit, "or I shall

insist on double rent," it is an unqualified notice, and does not give the tenant an option. *Doe d. Matthews v. Jackson*, 1 Doug. 175; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

A notice signed by one of several joint tenants on behalf of the others (*Doe d. Aslin v. Summersett*, 1 Barn. & Ad. 135), or by a person authorized by one of them (*Doe d. Kindersley v. Hughes*, 7 Mees. & W. 139; *Alford v. Vicery*, Car. & Marsh. 280; *Doe d. Bailey v. Foster*, 3 C. B. 215), will be sufficient; but a notice by an unauthorized agent will not be made good by an adoption of it by the principal after the proper time for giving it. *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

Service of a notice need not be personal; it will be sufficient, for instance, if left with and explained to a servant at the residence of the tenant, though not on the demised premises (*Jones v. Marsh*, 4 T. R. 464; *Doe v. Dunbar*, M. & Malk. 10); or, if put under the door of a house, if it be shown to have come to the hands of the tenant (*Alford v. Vicery*, Car. & Marsh. 280); and, in the case of a corporation, it may be served on its officers (*Doe v. Woodman*, 8 East, 228); and service on one of several joint tenants will be sufficient. *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196.

The lessor by a distress (which is acquiesced in) for rent, which has accrued subsequent to the expiration of the notice to quit, will waive any advantage which he may take on account of such notice (*Zouch v. Willinggate*, 1 H. Black. 311); but acceptance of (*Goodright v. Cordwint*, 6 T. R. 219; *Doe v. Batten*, Cowp. 243), or demand for, such rent is not necessarily a waiver of notice, it is a question of intention which must be left to the jury (*Blyth v. Dennett*, 13 C. B. 178), and if a distress were not acquiesced in, as if the tenant replevy, it would not be a waiver, inasmuch as there would be no evidence of a new tenancy. *Ib.* 180.

A second notice to quit after the expiration of a former one, if it in effect recognizes a new tenancy will be a waiver of the first notice (*Doe v. Palmer*, 16 East, 53); but not if it be served after an ejectment to enforce the former (*Doe v. Humphreys*, 2 East, 237). And it has been held, that if after the expiration of a notice to quit the landlord gives the tenant a fresh notice, that unless he quit in fourteen days he will be required to pay double value, the second notice is no waiver of the first, its object being merely the recovery of double value, and a qualified condonation of the trespass (*Doe d. Digby v. Steel*, 3 Campb. N. P. C. 115). So likewise a mere permission to stay for a limited time after the expiration of the notice will not be a waiver. *Whiteacre d. Boulton v. Symonds*, 10 East, 13.

If the tenant do not give up the premises peaceably, the lessor may sue him either in ejectment or trespass.

See the remedies in the Small Tenements Act (1 & 2 Vict. c. 74); where the rent, if any, does not exceed 20*l.* a year. As to the landlord obtaining possession where the tenant has deserted the premises, see 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52; *Aschcroft v. Bourne*, 3 Barn. & Ad. 684;

Basten v. Carew, 3 B. & C. 649; *Reg. v. Traill*, 12 Ad. & Ell. 761
v. Sewell, 8 Q. B. 161.

A tenant holding over, after notice in writing from his landlord under 4 Geo. 2, c. 28, s. 1, be liable to pay double the yearly value under 11 Geo. 2, c. 19, s. 18, when he has given notice himself, be liable to double the yearly rent. For the statutes and the decisions thereon, see 2 Chitt. Stat. 776—780.

As tenants from year to year have as certain an estate, while it lasts, lands they occupy, as those who hold for a longer term, it follows they are entitled to emblements like tenants for years, where their tenancy is determined by the happening of an uncertain event, over which they have no control (*Kingsbury v. Collins*, 4 Bing. 207, 12 Moore, 429); but it is not wise when they themselves put an end to the tenancy, or where, by means of a notice to quit or otherwise, the period of determination has been ascertained (*Woodf. Land. & Ten.* 524). However, now, by 14 & 15 Vict. c. 25, determination of leases or tenancies under any landlord entitled for life or for any other uncertain interest, instead of emblements, the tenant holds until the end of the current year.

As to the tenant's right to the way-going crops by custom, see *Worth v. Dallison*, 1 Smith's L. C. 299, and note; and as to fixtures *Elves v. Mawe*, 2 Smith's L. C. 99, and note.

LEWIS BOWLES'S CASE (a).

Pasch. 13 Jac. 1.

[REPORTED 11 Co. 79 b.]

Covenant to stand seised, in consideration of an intended marriage, to the use of T. and A., his intended wife, for their lives, without impeachment of waste ; and after their decease, to the use of the first issue male, and to the heirs male of such issue, lawfully begotten, and so on to the second, third, &c., issue male, remainder to the use of the heirs male of T. and A., and for want of such issue, to the use of B. and the heirs male of his body, remainder to the heirs of the body of T. and A. The marriage took place, T. died, leaving issue by A., J., who afterwards died. Resolved—1. T. and A. were seised of an estate tail, executed sub modo, viz. until the birth of issue male ; and then by operation of law, the estates are divided ; viz., T. and A. become tenants for their lives, the remainder to the issue male in tail, the remainder to the heirs male of T. and A. 2. Tenant in tail, after possibility of issue extinct, shall not be punished for waste ; shall not be compelled to attorn ; shall not have aid ; on alienation no consimili casu lies ; after death there can be no intrusion ; such tenant may join in the mise on the mere right ; shall not name herself nor be named tenant for life ; such tenant has but an estate for life, and a feoffment in fee is a forfeiture. An exchange between her and tenant for life is good. 3. The estate of tenant in tail after possibility ought to be a remnant and residue of an estate tail, and cannot be by the limitation of the party ; a tenancy in tail after possibility will not merge a prior estate for life. 4. A., although but tenant for life, shall have the privilege of tenant in tail after possibility, for the inheritance that was once in her. 5. If tenant for life or years fells timber, or pulls down the house, the lessor shall have the timber. If a house falls down per vim venti, the particular

(a) *Bowles v. Bury*, S. C. 1 Roll. Rep. 177.

tenants have a special property in the timber to rebuild the h
 6. *The pre-eminence and privilege which the law gives to ho*
 7. *Tenant for life without impeachment of waste has as great p*
to do waste, and convert it, at his own pleasure, as tenant in tail
The privilege is annexed to the privity of estate; if one who h
particular estate without impeachment of waste changes his estat
loses his advantage. 8. When timber trees are severed from
inheritance, either by act of the party or of the law, and be
chattels, the whole property of them is in the tenant for life wit
impeachment of waste.

LEWIS BOWLES, Esq., brought an action upon the case 1
 trover against Haseldine Bury the younger (which began in the K
 Bench, Hil. 10 *Jacobi Regis*, Rot. 1319) (b); and declared, tha
 was possessed of thirty cart-loads of timber, and lost them, and
 they came into the hands of the defendant, and that he, 20 Feb. an
 Jac. Regis, at Norton in the county of Hertford, converted them to
 own use; and, upon not guilty pleaded, the jury gave a special ve
 to this effect:—Thomas Bowles, Esq., grandfather of the said Le
 was seised of the manor of Norton Bury in the said county in
 and, 1 Sept. anno 12, by indenture, betwixt him on the one part
 William Hide and Leonard Hide of the other part, in consider
 of a marriage to be had betwixt the said Thomas Bowles and A
 daughter of the said William Hide, &c., covenanted, that after the
 marriage had and solemnized, that the said Thomas, his heirs an
 signs, would stand seised of the said manor of Norton Bury, to
 use of the said Thomas and Anne for the term of their lives, wit
 impeachment of waste; and after their deceases to the use of their
 issue male, and to the heirs male of such issue lawfully begotten,
 so over to the second, third and fourth issue male, &c., and for wa
 such issue, to the use of the heirs male of the body of the said Th
 and Anne lawfully begotten; and for want of such issue, to the us
 Thomas Bowles, son and heir apparent of Thomas Bowles the gr
 father, and the heirs male of his body issuing, and for want of
 issue, to the use of the heirs of the body of the said Thomas and A
 lawfully issuing. Which marriage was solemnized accordingly,
 the said Thomas the grandfather, and Anne, had issue John;
 afterwards the said Thomas the grandfather died without any issu

the body of Anne, but the said John; after whose death the said Anne entered into the said manor, and was thereof seised, with the said remainder over as aforesaid, and afterwards the said John Bowles died, and afterwards Thomas the son conveyed by fine his remainder to the use of Lewis Bowles the plaintiff, and Diana, his wife, and the heirs male of his body; and the said Anne being so seised of the said manor, with the remainder over as aforesaid, viz. 20 Feb. ann. Reg. Jac. reg. 9, a barn, parcel of the said manor *per vim ventorum et tempestat' pœnitius subvers. et ad terram deject' fuit*, and that the said thirty cart-loads of timber, in the declaration mentioned, were parcel of the said barn, and that the said timber was sound and fit for building, wherefore the defendant as servant of the said Anne, and by her command, took the said timber and carried it out of the limits of the said manor to Radial, in the same county; and afterwards the said Anne, 24 Feb. anno 9 Jac. Reg., made her last will, and thereof made Robert Osborne and Leon. Hide, Knts., her executors, and died; after whose death the plaintiff seized the said timber, and afterward the defendant, by the command of the said executors, converted it to his use, and if upon the whole matter the defendant was guilty or not, the jury prayed the opinion of the Court.

And in this case two questions were moved:—1. If upon the whole matter the wife should be tenant in tail after possibility, or that she should have the privilege of a tenant in tail after possibility, *sc.* to do waste, &c. 2. Admitting that she should not have the privilege, &c., if the clause of “without impeachment of waste” shall give her property in the timber so blown down by the wind.

And in this case eight points were resolved by the whole Court:—1. That, till issue, Thomas the grandfather and Anne were seised of an estate tail executed *sub modo*, *sc.* until the birth of the issue male, and then by the operation of law the estates are divided, *sc.* Thomas and Anne become tenants for their lives, the remainder to the issue male in tail, the reversion to the heirs male of Thomas and Anne, the remainder over as aforesaid; for the estate for their lives is not absolutely merged, but (exists) with this implied limitation, until they have issue male. Vide *Chudleigh's Case*, in the First Part of my Reports, fol. 120; and *Archer's Case*, fol. 66 b (c). 2. That tenant in tail, after possibility, has a greater pre-eminence and privilege in

(c) 1 Ves. 177, 526; 2 Vern. 545; 1 Vent. 306, 307, 345; 2 Jones, 2, 77; 3 Keb. 177, 178, 244, 501; Raym. 38, 249.

respect of the quality of his estate than tenant for life, but he has a greater quantity of estate than tenant for life; in respect of quality of his estate, it tastes much of the quality of an estate in out of which it is derived; and therefore, 1. (*d*) She shall not be punished for waste. 2. She (*f*) shall not be compelled to attorn. She (*g*) shall not have aid. 4. On (*h*) her alienation no *consimili* lies. 5. After (*i*) her death no writ of intrusion lies. 6. She (*k*) join the mise in a writ of right in a special manner ('Temp. 1 "Wast." 125; 39 E. 3, 16 a, b; 31 E. 3, "Aid," 35; 43 E. 3, 1 a E. 3, 22; 46 E. 3, 13 a, 27; 11 H. 4, 15 a; 7 H. 4, 10 b; 2 I. 17 b; 42 E. 3, 22; 3 E. 4, 11 a; 21 H. 6, 56; 10 H. 6, 1 b; 13 I. *Entre Congeable*, 56; 28 E. 3, 96 b; 26 H. 6, "Aid," 77; F. N. 203). 7. In (*l*) an action brought by her she shall not name her tenant for life (18 E. 3, 27 a). A woman brought a *cui in vitâ* et *clamat tenere ad vitam*, and maintained it in her count by a grant of a special tail to her and her husband, and that her husband was childless without issue, and the writ for variance of the title abated. 8. In an action brought against her, she shall not be named tenant for life *quod tenet ad terminum vitæ*, Mich. 39 & 40 Eliz. Rot. 3316, in *Comuni Banco* (*m*), *inter Veal et alios quer' et Read def' in quid j clamat*, and the note of the fine supposed that the defendant *tenuit ad terminum vitæ*, the defendant demandedoyer of the writ and of the note of the fine, and had it, and pleaded that he was seised in *absque hoc quod*, the day of the note levied *tenuit pro termino v* and the jury found that he held as tenant in tail after possibility of issue extinct; and it was adjudged *pro defendente*, for tenant in tail, a possibility, shall not be, in judgment of law, included in a writ or fine &c., within the general allegation of a tenant for life. Vide 19 E. 3,

(*d*) Doct. and Stud. lib. 2, c. 1; Litt. a. 34; 12 H. 4, 3 b, 4 a; 10 H. 6, 1 b; 45 E. 3, 25 a; 11 H. 4, 14 b, 15 a; 11 H. 6, 1 b; 2 Roll. 826, 828; 1 Roll. Rep. 100, 179, 184; West's Symb. 180 b; 9 Co. 139 a; 6 Co. 41 a; 2 Inst. 306, 302.

(*e*) 4 Co. 63 a; Co. Litt. 27 b; 1 Roll. Rep. 179; F. N. B. 59 b; 39 E. 3, 16 a, b.

(*f*) Co. Litt. 27 b; 1 Roll. Rep. 179; 1 Roll. 296; 39 E. 3, 16 a, b; 11 H. 6, 1 b; 43 E. 3, 1 a; Br. "Attorn." 10; Br. "Quid Juris clamat," 1, 6; 46 E. 3, 13 a; Fitz. "Quid Juris clamat," 14, 19; 38 E. 3, 20 a, b; 3 E. 4, 11 a; 12 E. 4, 3 a; 2 H. 5, 1 b; 29 E. 3, 1 b. Attornment was rendered

unnecessary by 4 & 5 Anne, c. 16; and 11 Geo. 2, c. 19.

(*g*) 31 E. 3, "Aid," 35; 8 H. 6, 2; 10 H. 6, 1 b; Fitz. "Aid," 67; 7 E. 3, 7 a; Fitz. "Monst. de Faits," 9; 26 H. 6, "Aid," 77; Co. Litt. 27 b; 1 Roll. 167; 39 E. 16 a, b; 2 H. 4, 17 b; Br. "Aid," 37; 11 E. 15 a; 1 Roll. Rep. 184.

(*h*) 1 Roll. Rep. 179; Co. Litt. 27 b.

(*i*) Ib.

(*k*) Ib.; 39 E. 3, 16 b.

(*l*) 1 Roll. Rep. 179; Co. Litt. 27 Doct. pl. 241.

(*m*) 2 Roll. Rep. 179; 46 E. 3, 27 a, Cro. El. 671; Noy, 74.

But as to the quantity, he has but an estate for life, and therefore, if he makes a feoffment in fee (*n*), it is a forfeiture of his estate (13 E. 2, *Entre Cong.* 56; 45 E. 3, 22; 21 E. 3, 96 b; 27 Ass. 60; F. N. B. 159). So if fee or tail general descends or remains to tenant in tail, after possibility, &c., the fee or estate tail is executed (32 E. 3, "Age," 55; 50 E. 3, 4; 9 E. 4, 17 b). And by the stat. of W. 2 (*o*), he in reversion should be received upon his default (2 E. 2; "Resceit," 147; 41 E. 3, 12; 20 E. 3, "Resceit"; 38 E. 3, 33 (*p*); vide 28 E. 3, 96 b; 39 E. 3, 16 a, b). And an exchange (*q*) betwixt tenant for life and tenant in tail, after possibility, is good, for their estates are equal (*r*).

3. It was resolved, that the estate of a tenant in tail, after possibility, ought to be a remnant and residue of an estate tail, and that by the act of God, and not by the limitation of the party (*s*), *dispositione legis*, and not *ex provisione hominis*; and therefore, if a man makes a gift in tail upon condition, that if he does such an act, that he shall have but for life, he is not tenant in tail after possibility of issue extinct, for that is *ex provisione hominis* and not *ex dispositione legis*; but it ought to be the remnant and residue of an estate tail, and that by the act of God and the law, *sc.* by the death of one donee without issue, Litt. 6, b; Doct. and Stud. lib. 2, cap. 1, fol. 61; 2 H. 4, 17 b; 26 H. 6, "Aid," 77.

If tenants in special tail recover in assise, and afterwards one dies without issue, and afterwards he who survives (who is tenant in tail after possibility) is re-disseised, he shall have a re-disseisin, for it is the same freehold he had before, for it is parcel of the estate tail; and because the wife in the case at bar had the estate for life by limitation of the party, and the estate which she had in the remainder (*t*), of the tenancy in tail after possibility, was not a larger estate in quantity, and, therefore, could not merge the estate for life, as has been said before, for this cause the wife was not tenant in tail after possibility (*u*).

4. It was resolved, that in this case the wife should have the (*x*) privilege of a tenant in tail after possibility for the inheritance which

(*) 10 H. 6, 2 b; 11 H. 4, 15 a; 43 Ass. 24; Br. "Forfeiture," 88; Br. "Aid," 37; 1 Roll. Rep. 179; 1 Roll. 851; 45 E. 3, 25 a; Co. Litt. 28 a; Br. "Waste," 43; Br. "Entre congeable," 12; Litt. a. 34; 39 E. 3, 16 a; 3 H. 6, 52 a; but, see now 7 & 8 Vict. c. 76, s. 7, and 8 & 9 Vict. c. 106, s. 4.
(o) Co. Litt. 28 a; 1 Roll. Rep. 179; 9 E. 4, 18 a; Br. "Estate," 25; Br. "Tenant

per Curtesy," 4.

(p) 1 Roll. Rep. 179; Co. Litt. 28 a.

(q) See 3 Salk. 158.

(r) Co. Litt. 28 a; 1 Roll. Rep. 179.

(s) 1 Roll. Rep. 183; Co. Litt. 28 a.

(t) Co. Litt. 154 b.

(u) See *Creagh v. Blood*, 3 J. & L. 123.

(x) Co. Litt. 28 a; 1 Roll. Rep. 178; 3 Prest. Conv. 284.

was once in her; for now, when John, the issue male, is dead, the privilege which she had in respect of the inheritance which was in remainder shall not be lost. And there is no question but a woman may be tenant in tail after possibility of a remainder, as well as a man in possession; and therefore, if a lease for life is made, the remainder to husband and wife in special tail, and the husband dies without issue, now is the wife tenant in tail after possibility of this remainder; if the tenant for life surrenders to her, as he may (for the life of him in remainder is higher than the other life), now is she tenant in tail after possibility of possession: and like this case, if the father is enfeoffed to him and his heirs with warranty, and the father enfeoffs his son, &c., and dies, in this case the son, although he has the land by purchase, yet he shall take the benefit of the warranty as heir, if he cannot vouch as assignee, and the warranty betwixt the father and son is lost, as it is adjudged in 43 E. 3, 23 b (y). So here, although the wife cannot claim the estate of tenant in tail after possibility, yet she may claim the privilege and benefit of it. And it was observed that tenants in special tail at the common law had a limited fee simple when their estate was changed by the statute *De donis conditio*; yet there was not any change of their interest in doing of waste when by the death of one donee without issue the estate is changed, yet the power to commit waste, and to convert it to his own use, is not altered nor changed for the inheritance which was once in him, *Hil. 2 Jac. Rot. 229 inter (z) Brooke and Rogers, in Communi B.* If a timber tree becomes *arida, sicca, non portans fructus, nec folia æstate, nec existens mæremium*, yet because it was once an inheritance &c., no tithes shall be paid for it, for that the quality remains, although the state of the tree is altered.

5. That if (a) tenant for life, or for years, fells timber, or pulls down the houses, the lessor shall have the timber; and because this point was resolved in this Court upon a solemn argument in (b) *Liford's Case* at Michaelmas Term, which *vide* before in this book, I will make a shorter report. 1. It is apparent in reason, that the lessee had the timber but as things annexed to the soil, and therefore it would be absurd in reason, that when by his act and wrong he severs them from the soil, that he should gain a greater property in them than he had by

(y) 2 Roll. 742; 1 Co. 98; 1 Roll. Rep. 180; Co. Litt. 384 b.

(z) Moor, 908; 2 Inst. 643; 1 Roll. Rep. 100; 1 Roll. 640; Cro. Jac. 100; 11 Co.

Rep. 48 b, 49 a; Doct. and Stud. 175

(a) Cro. Car. 242, 274; 2 Roll. 119.

(b) 11 Co. Rep. 48 a.

demise. 2. It (c) is without question (as it is resolved in the said case), that the lessor has the general ownership and right of inheritance in the houses and timber trees, and the lessee has but a particular interest, and, therefore, be they pulled down or felled by the lessee or any other, or by wind or tempest blown down, or by any other means disjoined from the inheritance, the lessor shall have them in respect of his general ownership, and because they were his inheritance; and as to *that*, the resolutions in *Herlakenden's Case*, in the Fourth Part of my Reports, folio 63 a, were affirmed for good law (d), and *Paget's Case*, in the Fifth Part of my Reports, folio 76 b, for although he cannot punish them in an action of waste at the common law, because it was his own act, and in his lease he has not made provision by covenant or condition; yet the inheritance and general ownership remains in the lessor, and the lessee (as hath been said) has but a special interest in the houses and timber trees, so long as they are annexed to the land, and this appears by the statute of (e) Marlebridge, c. 23. *Item firmarii vastum, &c., non facient, nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens quod hoc facere possunt*, whereby it appears, that the lessees for life or years which then were, could not rightfully fell the trees or pull down the houses, unless the lessor had granted by deed to do it. In which it was also observed, that at the time of the making of the same act, the said clause of "without impeachment of waste" was in use, which proves that it was to such purpose that the lessee might commit waste and dispose it to his own use, which he could not do without such clause. 3. Every lessee for life and years ought by the law to do fealty upon his oath, and it would be against his oath to waste the houses and timber trees. And, *nota*, reader, upon this statute of Marlebridge lies a prohibition of waste against the lessee for life, and lessee for years, to prohibit them, that they shall not do waste before any waste was done, as it was (f) against tenant in dower, and tenant by the courtesy at the common law. *Vide* Bract. 316, the judgment in waste at the common law. Tenant in dower or by the courtesy, have as high an estate as lessee for life, and it appears that it was not lawful for tenant by the courtesy or in dower to do waste, *ergo* no more

(c) Cro. Car. 243; 11 Co. Rep. 48 b; Cro. Car. 242; Moor, 19; Palmer, 327; 5 Co. 76 b; 4 Co. 62, 63; 1 Roll. Rep. 181.
(d) 4 Co. 62 b; Doct. and Stud. lib. 2, c. 1.

(e) 1 Roll. Rep. 182; 2 Inst. 144, 145, 302.

(f) 2 Roll. 813; Co. Litt. 53 b; 2 Inst. 145; 4 Co. 62 b; 14 H. 8, 6 a; 13 H. 7, 20 b.

for tenant for life : the only difference was, that a prohibition of laying against tenant in dower, and by the courtesy, at the common law, and not against the lessees till the said statute of Marleborgh. And to prove what interest the lessee for life has in the trees at common law, it appears by Bracton (who wrote before the statute of Glouc'), lib. 4, Tract' de Assisâ Novæ Dis. c. 4, f. 217. *Si quis viderit, vel destructionem in tenemento quod tenet ad vitam suam quod modum excedit, et rationem, cum tantum concedatur ei ratione estoverium, et non vastum, facit transgressionem, et si talis impedire ille tenens assisam non habebit. Intentio enim talis liberabit a disseisina quia in eo quod tenens abutitur male utendo, et debitum usum in modum debitum excedendo, non poterit dicere quod disseisitus est, quia tamen rationabilis usus ei conceditur*; which proves directly, that it is wrong in the lessee for life to do waste or destruction at the common law. And it was resolved, if a house falls down (g) *per vim vel casum* in the time of such lessee for life or for years, or in the time of the tenant in dower, or tenant by the courtesy, &c., that such particular tenants have a special property in the timber to rebuild the like house as if other was for his habitation : as if they fell a tree for reparation, they have a special property to that purpose in it, and therewith agree (44 E. 3, 5 b; 44 E. 3, 44 b; 29 E. 3, 3, and 10 E. 4, 3 a). But such particular tenants cannot give or sell the tree so felled, for the general property is in the lessor; and therefore, Litt., f. 15, holds, if I bail goods [cattle] to another to manure his land, now he has a special property in them to that purpose: and in that case, if he sells them, a general action of trespass lies against him. See 11 H. 4, and 23 b.

6. The pre-eminence and privilege (i) which the law gives to houses which are for men's habitation was observed. First, a house ought to have the priority and precedency in a *præcipe quod reddat* before a meadow, pasture, wood, &c., F. N. B. 2, &c., for his house is his chief *et (k) domus sua est unicuique tutissimum refugium*. 2(l). The house of a man has privilege to protect him against arrest, by virtue of process of law, at the suit of a subject; *vide Semayne's Case*, in

(g) 1 Co. 63 a; Co. Litt. 53 a.

(h) Cro. Eliz. 784; 11 Co. 47 a; 1 Roll. Rep. 181; 2 Roll. 556; 5 Co. 13 b; Cro. Car. 274.

(i) See 6 Mod. 105, &c., Ibid.

(k) 5 Co. 31 b; Co. Litt. 4 a; 1 Roll. Rep. 182; 3 Inst. 162.

(l) 4 Inst. 177; Hob. 62, 263, 264; Cro.

Jac. 486, 556; 1 Jones, 429; Cro. Ca. 438; March. 3; 1 Brownl. 50; Yel. 29; Cro. Eliz. 908; Moor, 668; 18 "Execution," 252, contra; 4 Leon. 4 E. 4, 9 a; 18 E. 4, 4 a; Br. "Execution" 100; Br. "Trespass," 390; 1 Bulstr. Ben. 121.

Fifth Part of my Reports, fo. 91 b. 3. It has privilege against the king's prerogative, for it was resolved by all the judges, Mich.(m) 4 Jac., that those who dig for salt-petre shall not dig in the mansion-house of any subject without his assent, for then he, or his wife or children, cannot be in safety in the night, nor his goods in his house preserved from thieves and other misdoers. 4. He who kills a man *se defendendo*, or a thief who would rob him in the highway, by the common law shall forfeit his goods, but he who kills one that would rob and spoil him in his house shall forfeit nothing (3 E. 3, "Corone," 330; and 26 Ass. 23, &c.) 5. If there be two joint-tenants of a wood, or arable land, the one has no remedy against the other to make inclosure or reparations for safeguard of the wood or corn; but if there be two joint-tenants of a house, the one shall have a writ *De reparatione faciendâ* against the other, and the words of the writ are *ad reparationem et sustentationem ejusdem domus tenetur* (n) (F. N. B. 127 a, b). If a man is in his house, and hears that others will come to his house to beat him, he may call together his friends, &c. into his house to aid him in safety of his person (o); for, as it has been said, a man's house is his castle and his defence, and where he properly ought to remain: but if a man be threatened if he comes to such a fair or market that he shall be beaten, in that case he cannot make such assembly, but he ought to have remedy by surety of the peace. 21 H. 7, 39 a (p).

7. The clause of "without impeachment of waste" gives a power to the lessee, which will produce an interest in him if he executes his power during the privity of his estate, and therefore to examine it in reason. 1. These(q) words, *absque impetitione vasti*, are as much as to say, without any demand for waste, for *impetitio* is derived from *in* and *peto*, and *petere* is to demand, and *petitio* is a demand, and *sine impetitione* is without any manner of demand or impeachment: then this word demand is of a large extent(r), for if a man disseises me of my land or takes my goods, if I release to him all actions, yet I may enter into the land or take my goods, as Litt. holds, f. 115, and therewith agree 19 Ass. 3; 19 H. 6, 4 b; 21 H. 7, 23 b; 30 E. 3, 19, for by the release of the action the right or interest is not released; but if in such case I release(s) all demands, that will bar me, not only of my action

(m) 1 Roll. Rep. 182; 12 Co. 13.

(n) Co. Litt. 54 b; 1 Roll. Rep. 182; 5 Co. 91 b.

(o) 21 H. 7, 39 a; Br. "Riots," &c.; 1 Fitz. "Trespas," 246; 6 Mod. 210.

(p) 1 Roll. Rep. 182; Moor, 18, 327; 2 Inst. 146; Hob. 132, lib. 4, f. 63 a; Poph. 193, 194, 195.

(q) Latch. 269, 270; Bridg. 102; Dy. 47, pl. 11 b; 2 Co. 23 a, 72 a, pl. 135 b; Cro. Jac. 216; 2 Roll. 835; 2 Inst. 146; 9 Co. 9 a; 2 Roll. Rep. 325; Hedl. 77; Moor, 317.

(r) Litt. f. 116, ss. 496, 497; Co. Litt. 386 a, b; 4 Co. 63 a; 1 Roll. Rep. 184.

(s) 1 Roll. Rep. 184; 8 Co. 154 a.

but also of my entry and seizure, and of the right of my land, and the property of my goods: as it was resolved in *Chauncy's Case*, 34 Br. "Release," 90(t); 2 H. 7, 6 b; the king made one sheriff *sin puto*, thereby he shall have the revenues which belong to his office to collect to his own use. But if the words had been (u) *absque in vasti per aliquod breve de vasto*, then the action only would be charged, and not the property in the trees, but that the lessor after the fall of them might seize them: and this difference appears in 344 a, b, in *Walter Idle's Case*(x), where a lease was made "without impeached or impleaded for waste," upon which it was collected these words "without being impleaded," without these words "out(y) being impeached for waste," were not sufficient to bar the lessor of his property; and that if the lessor had granted that the lessee might do waste, he thereby had power not only to do so but also to convert it to his own use; and that the words of the said act of Marlebridge, and the statute *De(z) prerogativa* c. 16, do prove, where it is said, that the king shall have *ad diem, et vastum, sc.*, which is as much as to say, that he shall have the trees, &c. at his own disposition. 2. It was said, that the continual and constant opinion of all ages was, that those words gave power to the lessee to do waste to his own house, and it would be dangerous now to recede from it; and as it is said in 38 E. 3, 1 that the judges (so we say in this case), we will not change the law which has been always used; and it is well said in 2 H. 4, 18 b, it is better that there should be a defect than that the law should be changed: and the opinion of Wray, Chief Justice, and Manwood, cited in *lakenden's Case*, was not judicial but *primâ facie* upon an arbitrament without any argument, and perhaps upon the sight of (c) 27 b "Waste," 8; and therefore, although the chief justice argued in this case against their opinions, yet it was with great reverence to them, as with Aristotle in the like case, *amicus Plato, amicus Socrates magis amica veritas*; and *qui non liberè veritatem pronunciat, pro veritatis est*. And the truth of this case appears by Littleton in chapter on Conditions, fol. 82(d), where he puts this case, if a feoff

(t) 1 Roll. Rep. 183; Br. "Patent," 45, 109.

(u) Co. Litt. 220 a; 2 Inst. 146; 1 Roll. Rep. 184; Cro. Car. 274.

(x) 8 Co. 75 b; Poph. 194.

(y) 1 Roll. Rep. 184; Hob. 132.

(z) 1 Roll. Rep. 182.

(a) Dyer, 184, pl. 63; 1 Roll. Rep. 183;

Co. Litt. 220 a; Hob. 132.

(b) 1 Roll. Rep. 183; 4 Co. 63 a; 148, pl. 63.

(c) Poph. 194.

(d) Sect. 352; Co. Litt. 218 b, 2 1 Roll. Rep. 183; Vin. Abr. "Waste," 2 R. a.

be made upon such condition that the feoffee shall give the land to the feoffor, and to the wife of the feoffor, to have and to hold to them and to the heirs of their two bodies begotten, the remainder to the right heirs of the feoffor; in that case if the husband dies, living the wife, before any estate in tail made to them, then ought the feoffees by the law to make an estate to the wife as near the condition and as near the intent of the condition as he can make it, *sc.* to lease the land to the wife for term of her life without impeachment of waste, the remainder to the heirs of the body of her husband on her begotten, the remainder to the right heirs of the husband: and the reason why the lease shall be made in this case to the wife without impeachment of waste is, that the estate shall be to the husband and his wife in tail; and if such estate had been made in the life of the husband, then after the death of the husband she had had an estate in tail, which estate is without impeachment of waste; and so it is reasonable that a man should make an estate as near the intent of the condition as he can; which case directly proves that tenant for life without impeachment of waste has as great power to do waste and to convert it at his own pleasure as tenant in tail had. That these words "without impeachment of waste," are sufficient words to give tenant for life such power, *vide* (e) 2 H. 4, 5 b, and the *Lord Cromwell's Case*, in the Second Part of my Reports, f. 81 a, b, 82 a; and for this clause of "without impeachment (f) of waste," 3 E. 3, 44; 8 E. 3, 4 a, b, 35 a; 24 E. 3, 32; 43 E. 3, 5 a; 5 H. 5, 8; 27 H. 6, "Waste," 8; 4 E. 4, 36 a; 20 H. 7, 10; 28 H. 8, Dyer, 10; and so the *quære* in the said book of 27 H. 6 well resolved. And see the opinion of Statham in abridging the said book against it (g). But the said privilege of "without impeachment of waste" is annexed to the privity of estate, 3 E. 3, 44, by Shard and Stone:—If one who has a particular estate without impeachment of waste changes his estate, he loses his advantage, 5 H. 5, 9 a. If a man makes a lease for years, without impeachment of waste, and afterwards he confirms the land to him for his life, now he shall be charged for waste, 28 H. 8; Dyer, 10 b (h). If a lease is made to one for the term of another's life, without impeachment of waste, the remainder to him for his own life, now he

(e) Fitz. "Condition," 5; Br. "Condition," 33.

(f) 1 H. 7, 15 a; Plowd. 141 a; 21 H. 6, 47 a; 28 H. 8; Dyer, 10, pl. 37; 20 H. 7, 4 a; 21 H. 7, 24 a; Perk. s. 721; 21 H. 7, 31 a; 2 Co. 23 c; 9 Co. 9 a; Co. Litt. 220 a; 3 Bulst. 136; 9 H. 6, 35 a; Fitz. "Waste," 39; Plowd. 135 b; 19 H. 6, 63 b;

10 H. 7, 3 a; 21 H. 7, 24 a; 16 H. 7, 4 b; 2 Roll. Rep. 325; Poph. 193, 194, 195.

(g) 1 Roll. Rep. 183; Co. Inst. 28 a; Moor, 327; 8 Co. 76 b; Br. "Wast," 71; Latch. 269.

(h) Dyer, 10, pl. 37; 5 Co. 13 a; 1 Bulst. 136; 8 Co. 76 b; 19 H. 6, 23 a; Poph. 194; Latch. 269.

is punishable for waste, for the first estate is gone and drowned ; so of a confirmation. It was adjudged in *Ewen's (i) Case*, Mich. 28 & 29 Eliz., that where tenant in tail, after possibility of issue extinct, granted over his estate, that the grantee was compelled in a *quid juris clamat* to attorn, for by the assignment such privilege is lost ; and that judgment was affirmed in the King's Bench in a writ of error, and therewith agrees (k) 27 H. 6, "Aid," in Statham ; *vide* 29 E. 3, 1 b. The heir at common law should have a prohibition of waste against tenant in dower, but if the heir granted over his reversion, his grantee should not have a prohibition of waste ; for it appears in the Register, 72, that such assignee in an action of waste against tenant in dower shall recite the Statute of Gloucester, *ergo* he shall not have a prohibition of waste at common law, for then he should not recite the statute, *vide* F. N. B. 55 c ; 14 H. 4, 3 ; 5 H. 5 (7), 17 b.

Lastly, it was resolved, that the said woman, by force of the said clause of "without impeachment of waste," had such power and privilege ; that though in the case at bar no waste be done, because the house was blown down *per vim venti* without her fault, yet she should have the timber which was parcel of the house, and also the timber trees which are blown down with the wind ; and when they are severed from the inheritance, either by the act of the party or of the law, and become chattels, the whole property of them is in the tenant for life, by force of the said clause of "without impeachment of waste." And for this cause judgment was given *per omnes Justiciarios una voce, quod querens nihil caperet per billam*.

This is usually cited as a Leading Case whenever questions arise relative to the estates of persons having freeholds not of inheritance, and in determining what is their power over or their interest therein. See Poph. 193 ; Co. Litt. 28 a ; 15 Ves. 423.

Estates of freehold not of inheritance are, *first*, conventional, that is to say, created by some legal instrument, as a deed or will ; and *secondly*, such as arise by mere operation of law.

Of the first class are tenancies for a man's own life, and pour autre vie, or for another's life. Of the second class—The estate of tenant in tail after possibility of issue extinct ; the estate of tenant by the Curtesy ; and Dower.

(i) 1 Roll. Rep. 179 ; Co. Litt. 316 a, Moor, 321 ; Poph. 194 ; Latch. 262 ; 1 Roll. 28 a ; 2 Inst. 302. Rep. 183.

(k) Co. Litt. 28 a ; Dyer, 184, pl. 63 ;

1. *Estate for Life.*

An estate for a person's own life may be either *absolute*, as upon a conveyance or devise to A. for life; or its duration may be limited to some *uncertain* period included in such life; as, for instance, if an estate be conveyed to a woman as long as she remain single or during widowhood, or to a man and woman during coverture, or so long as a person dwell in a particular house, or so long as he pay a certain sum, or until he be promoted to a benefice, or for any like uncertain time; in all these cases an estate for life is conferred, determinable upon the happening of a particular contingency. Co. Litt. 42 a.

Upon the same principle, if a conveyance be made of a manor to a man until 100*l.* be paid out of the annual profits, inasmuch as such profits are *uncertain*, he will have an estate for life determinable upon the levying of 100*l.* On the other hand, if a man grant a rent of 20*l.* per annum until 100*l.* be paid thereout, the grantee will only have an estate for the term of five years, for there the time which it will take to pay the 100*l.* is *certain*, and depends upon no uncertainty. Co. Litt. 42 a.

There are, however, some uncertain interests, which, being of an exceptional character, are held to be chattels. Thus where lands are devised to executors for payment of debts, until the testator's debts be paid, although it is uncertain when that will take place, the executors have only a chattel interest, the reason being that if it were held that the executors should have it for their lives, then by their deaths their estate would cease; but by holding it to be a chattel, it will go to the executors of the executors for payment of the debts. Co. Litt. 42 a.

Moreover, although tenants by statute merchant, by statute staple, and by elegit, whose estates are created by divers acts of parliament, have uncertain interests in lands or tenements, they have but chattel, and no freehold, interests. Co. Litt. 42 a.

Where there is no express limitation of any estate, either under a conveyance at common law or under the Statute of Uses, the person to whom the conveyance is made, will take an estate for his own life. Co. Litt. 42 a.

So where by will a testator gave land to a person without words of limitation he would take only a life interest. (See note to *Edward Seymour's Case*, post.) This being found to defeat the intention of persons making wills, it has been enacted by the new Wills Act (1 Vict. c. 26, s. 28) that a devise to a person without any words of limitation will pass the fee simple or other the whole estate of the testator, unless a contrary intention appear by the will.

If a tenant in fee simple, however, make a lease to B., to have and to hold to B. for term of life, without mentioning for whose life, it will be deemed for the term of the life of B., upon the ground that the deed ought to be taken most strongly against the lessor, and an estate for a man's own life is higher than that for the life of another (Co. Litt. 42 a). But if a

tenant in tail make such lease without expressing for whose life, it will be taken to be for the life of the lessor, for the law will not adopt a construction which would work a wrong, where it can adopt another which is consistent with the legal rights of the lessor. Co. Litt. 42 a.

2. *Tenant pour autre Vie.*

An estate pour autre vie is the lowest estate of freehold, being not so great as an estate for one's own life. This estate arises, not only where it is originally limited, as, for instance, in a conveyance to A. for the life of B., but also where a tenant for his own life, whether by convention or by operation of law, as tenant by the curtesy or tenant in dower, grants over his or her estate. Co. Litt. 41 b.

General Occupancy.

According to the common law, where an estate was held pour autre vie, as, for instance, by A. for the life of B. (who is termed the *cestui que vie*), and the tenant pour autre vie died in the life of the *cestui que vie*, inasmuch as the heir could not take the estate without words of inheritance, and the personal representatives could not take it because it was a freehold, the first person who entered might hold as tenant pour autre vie, and he was termed a *general occupant* (Co. Litt. 41 b). The same result followed where the grantee of the tenant pour autre vie died (Ib. 41 b); and any person in possession as a lessee (3 Bac. Ab. 188), or a mere tenant at will in preference to a lessee not in possession (*Anon.*, cited 1 Vern. 233), would consequently have been general occupant. But against the king there could be no occupant, and therefore no man could gain the king's land by priority of entry. Co. Litt. 41 b.

Special Occupancy.

Where, however, an estate pour autre vie was limited to a man and *his heirs*, his heir took as *special* occupant and not by descent, and not being liable to his ancestor's debts, he could plead *riens per descent* (*Atkinson v. Baker*, 4 T. R. 229; *Doe v. Luxton*, 6 T. R. 292). If the limitation were to a man, *his executors and administrators*, notwithstanding the doubts which formerly existed upon the subject, they would take as *special* occupants (*Duke of Marlborough v. Godolphin*, 2 Ves. 61; *Ripley v. Watworth*, 7 Ves. 425; and see 18 Ves. 273). And where an estate pour autre vie was limited to a man, *his heirs, executors and administrators*, it was held that the heir took as *special* occupant. *Atkinson v. Baker*, 4 T. R. 229.

With regard to incorporeal hereditaments, as rents, of which a man was tenant pour autre vie, although upon his death there could not be a *general occupancy*, because there could be no entry thereon there might be *special* occupancy (Co. Litt. 41). Thus where a rentcharge was limited to a man and *his heir* pour autre vie, upon his death his heir would take as quasi special occupant (*Hassell v. Gonthwaite*, Willes, 505; *Kendal v. Micfeild*,

15 Vin. Abr. "Mortgage," 457; Barnardist. C. C. 46); but it seems his executors or administrators would not take as special occupants, though named. *Cramley's Case*, Cro. Eliz. 721; *Salter v. Butler*, Ib. 901; Moore, 664; Vaugh. 200; Vin. Abr. "Occupant" (C); 3 Bac. Ab. B. "Estate for Life and Occupancy."

Great inconvenience being occasioned by the scramble for estates which occurred, where *no special occupant* was named, and it being manifestly unjust that an estate pour autre vie should not be assets for payment of debts, the Statute of Frauds (29 Car. 2, c. 3) enabled the tenant pour autre vie to devise it, and enacted, that if no devise were made, it should be chargeable in the hands of the heir, if it came to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple; and in case there should be no special occupant, it should go to the executors or administrators, and be assets in their hands. As doubts arose to whom the *surplus* of such estates (when they were not devised) should go, after paying the intestate's debts, it being held, however, that the next of kin were not entitled (*Oldham v. Pickering*, 2 Salk. 464; Carthew, 376), the 14 Geo. 2, c. 20, s. 9, enacted that such estates pour autre vie, in case there were no special occupant thereof, of which no devise had been made by virtue of the 29 Car. 2, c. 3, should be distributed as the personal estate of the testator or intestate.

General occupancy, it will be observed, was abolished by 29 Car. 2, c. 3; hence, on the death of a person having an estate pour autre vie, without any words of limitation, the estate would go to his devisee, or, if he died intestate as to it, to his executors or administrators, and be assets in their hands for payment of his debts; and by 14 Geo. 2, c. 20, the surplus would be distributable amongst his next of kin as personalty. In the case of *Doe d. Lewis v. Lewis*, 9 Mees. & W. 662, a person, possessed of a lease granted to him his heirs and assigns for the lives of three persons, devised the premises to his son (who died intestate) and his assigns for the residue of the term; it was held, by the Court of Exchequer, that the premises went to the administratrix of the son, under the 12th section of the Statute of Frauds, and not to his heir. "Here," said Parke, B., in his judgment, "there is no special occupant, the title of the first lessee having been put an end to by the will; the land has been held under a tenancy pour autre vie to the son and his assigns, and as he died without creating any assigns, the property goes to his personal representative." Sed vide *Doe d. Jeff v. Robinson*, 8 B. & C. 296; 2 Mann. & Ry. 249.

Although we have seen that at common law, if a rent were granted to a man during the life of another, the rent would have determined on the death of the grantee, because there was no one to take under the grant, there being in other words no general occupancy of a rent; nevertheless it has been held, that by the 12th section of 29 Car. 2, c. 3, when the grantee of a rentcharge pour autre vie dies during the life of cestui que vie, it will go to his executors, although executors are not named in the grant. *Bearpark v. Hutchinson*, 7 Bing. 178; see also *Rawlinson v. Duchess of Montague*, 3 P. Wms. 264, n. (D).

An estate pour autre vie may be limited over by way of remainder (*Wastneys v. Chappell*, 3 Bro. P. C. 50, Toml. Ed.); and a remainderman (if not barred) will take as special occupant (*Allen v. Allen*, 2 Dru. & Warr. 325). If an estate pour autre vie be limited to a man and the heirs of his body, it will go to the person who would take an estate tail in the case of freeholds of inheritance, and he obtains this estate at once, it not being dependent as in the case of a fee simple conditional, upon the birth of issue. *Ib.*

Power of quasi Tenant in Tail pour autre vie over his Estate.

A quasi tenant in tail pour autre vie in possession has complete power over the estate to bar the entail and the remainders over, by any act inter vivos dealing with the estate precisely as if there had never been any settlement (*Ib.* 327); and he can convey his interest by any of the ordinary assurances; and inasmuch as formerly it did not require the solemnity of a fine or recovery (*Blake v. Luxton*, Geo. Cooper, 184, 185; *Low v. Burrow*, 3 P. Wms. 262), so now it does not require a disentailing deed under 3 & 4 Will. 4, c. 74. Moreover, it is not requisite that he should declare his intention of barring the quasi entail, as it is sufficient if he do any act which would vest in him a new or different estate. Thus it has been held, that a renewal of a lease for lives by a quasi tenant in tail gives him a new estate discharged of the former limitations and bars the estate in remainder (*Baker v. Bayley*, 2 Vern. 225; *Grey v. Mannock*, 2 Eden, 339), even although the lease may originally have been vested in trustees who did not join in the surrender of the old lease (*Blake v. Blake*, 1 Cox, 266; 3 P. Wms. 10, n.; and see *Campbell v. Sandys*, 1 S. & L. 295; *Lloyd v. Johnes*, 9 Ves. 63; *Doe v. Luxton*, 6 T. R. 289), or prior incumbrances may have been in existence. *Blake v. Luxton*, Geo. Coop. 178; 2 Dru. & Warr. 327, 330.

So any act of ownership exercised over the whole estate as an assignment of a mortgage or an increase of the charge on the lands, or the creation of a new equity of redemption by the quasi tenant in tail, will bar the remainderman (see *Allen v. Allen*, 2 Dru. & Warr. 331; *Cann v. Cann*, 1 Vern. 480; *Dunn v. Green*, 3 P. Wms. 10; *Challoner v. Murhall*, 2 Ves. jun. 524). *Secus* if the quasi tenant in tail merely concur in a transfer of the mortgage. *Fearne's Executory Devises* by Powell, vol. 2, p. 322; and see 2 Dru. & Warr. 331.

However, a quasi tenant in tail in possession cannot bar the remainders over by a mere will (*Allen v. Allen*, 2 Dru. & Warr. 326); though Lord Kenyon, in *Doe d. Blake v. Luxton*, 6 T. R. 293, thought he might. *Campbell v. Sandys*, 1 S. & L. 294.

The concurrence, however, of the tenant for life in a conveyance with the quasi tenant in tail in remainder, is necessary in order to bar the subsequent limitations (*Wastneys v. Chappell*, 3 Bro. P. C. 50, Toml. Ed.; *The Duke of Grafton v. Hanmer*, 3 P. Wms. 266, n.; *Slade v. Pattison*, 5 L. J., N. S., 51), though it seems it is not necessary that he should be a conveying party (*Allen v. Allen*, 2 Dru. & Warr. 335); so in the converse case, if the

quasi tenant in tail concurs in a conveyance by the tenant for life, the remainderman will be barred (*Norton v. Frecker*, 1 Atk. 524; West, Rep. t. Hardw. 203); and it seems that, by analogy to the rule which prevails in the case of estates of inheritance, although a quasi tenant in tail, without the concurrence of the tenant for life cannot bar a remainderman, he has power to bar himself and his issue. *Allen v. Allen*, 2 Dru. & Warr. 337.

How far Occupancy applies to Copyholds.

The principle of *general occupancy* at common law was not applicable to copyholds, because, as the freehold is in the lord, there was no estate vacant upon which the first comer could enter without invading the interest of another party. *Ven v. Howell*, 1 Roll. Abr. 511 (L), pl. 3; *Smartle v. Penhallow*, 6 Mod. 63; 1 Salk. 188; 2 Ld. Raym. 994; 3 Salk. 181; *Withers v. Withers*, Amb. 152; *Zouch d. Forse v. Forse*, 7 East, 186; *Doe v. Robinson*, 2 Mann. & Ry. 266, n.; *Doe d. Foster v. Scott*, 4 Barn. & Cress. 714; 7 Dowl. & Ry. 190.

There may, however, be a *special occupancy* of copyholds either with (*Doe v. Goddard*, 1 Barn. & Cress. 522; *Right v. Bawden*, 3 East, 276, 277) or without (*Doe d. Lempriere v. Martin*, 2 Black. 1148; and see *Howe v. Howe*, 1 Vern. 415; *Rundle v. Rundle*, 2 Vern. 264) a special custom.

It will be observed, that by the 6th section of 1 Vict. c. 2, which is hereafter set forth, that where there is no special occupant of copyholds, they will go to the executors or administrators as personal estate.

Law as settled by 1 Vict. c. 26, ss. 6, 34.

The 12th section of 29 Car. 2, c. 3, and the 9th section of 14 Geo. 2, c. 20, were repealed by the 1 Vict. c. 26, which enacts, that if no disposition by will shall be made of any estate pour autre vie of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate pour autre vie, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go, and be applied and distributed, in the same manner as the personal estate of the testator or intestate (s. 6). By the 34th section of the same act, it is provided that the act shall not extend to any estate pour autre vie of any person who shall die before the 1st day of January, 1838.

It seems, notwithstanding the legislation against general occupancy, it may for a limited period subsist in one case. Suppose a tenant pour autre vie dies intestate; until administration is taken out, the estate must go either

to the first person who takes possession as general occupant, or to the administrator by relation back from the time of his taking out letters of administration to the death of the tenant pour autre vie. Mr. Preston thought that the former hypothesis was most consistent with our system of tenures, which so carefully guards against the abeyance of the freehold. 1 Prest. Convey. 44, 45.

Order to produce Cestui que vie.

It may be here mentioned that, upon the application of any person having any claim in remainder, reversion or expectancy, the Lord Chancellor may, by 6 Anne, c. 18, order the cestui que vie to be produced. See *Ex parte Grant*, 6 Ves. 512; *Ex parte Whalley*, 4 Russ. 561; *Re Isaac*, 4 My. & Cr. 11; *Re Lingen*, 12 Sim. 104; *Re Clossey*, 2 Smale & Giff. 46.

3. *Tenant in Tail after Possibility of Issue extinct.*

A tenancy in tail after possibility of issue extinct is, where lands, having been limited in *special* tail, and one of these parties from whom the issue is to proceed, dies without issue, in that case the survivor becomes thereupon tenant in tail after possibility of issue extinct (Litt. s. 32). Thus, if lands are limited to a man and woman and the heirs of their two bodies, or to a man and the heirs of his body begotten on the body of his wife, in the former case on the death of either husband or wife, and the latter case on the death of the wife without issue, the survivor will be tenant in tail without possibility of issue extinct. Litt. ss. 33, 34.

Although, upon the death of the survivor, if there be issue living, such survivor would be tenant in tail, nevertheless, on the death of such issue without issue inheritable under the entail, the survivor will become tenant in tail after possibility of issue extinct. Litt. s. 32.

This estate is so called because it is evident, that the tenant can by no possibility have any issue inheritable to the same estate tail. The mere improbability of a man and wife having children where land is settled upon them and the heirs of their two bodies, (as if they live to the age of 100 years and have no issue,) will not change their tenancy in tail, to a tenancy in tail after possibility of issue extinct, for the law sees no impossibility of their having children (Co. Litt. 28 a). Upon the same principle in *Platt v. Powles*, 2 Mau. & Sel. 65, where a testator devised a reversion to his wife for her life, and after her decease to the heirs of her body by him (the testator) lawfully begotten, and for want of such issue remainder over. Although there was no issue of the marriage *at the time of the death* of the testator, it was held, that the wife was tenant in tail after possibility of issue extinct. "There was a *possibility*," said Dampier, J., "*during the whole period of gestation*, that she might have issue; and the event cannot vary it. It is the possibility and not the probability to which the law looks, and here the possibility was not at all more remote than that which exists between parties of an age past childbearing."

This estate must arise by operation of law, or, as Coke terms it, "by act of God," and that by dying without issue and not by the act or limitation of the parties. Thus, if land be given to a man and to his wife, and to the heirs of their two bodies, and afterwards they are divorced *causâ præcontractûs*, or *consanguinitatis*, or *affinitatis*, their estate of inheritance is turned to a joint estate for life; and albeit they had once an inheritance in them, yet as the estate is altered by their *own act* and not by the act of God, as by the death of either party without issue, they are not tenants in tail after possibility of issue extinct. Co. Litt. 28 a; 1 Roll. Abr. 841.

Lord Eldon remarks that, "in *Lewis Bowles's Case*, the limitation was to the husband and wife for their joint lives; and both of them, as the joint estate was so expressed, were unimpeachable of waste; with remainder to the male issue of the marriage; under which limitation the issue were purchasers; and there is a limitation to the heirs of the body of the husband and wife, with remainder over; and it was held, that *until* issue born they were tenants in tail in possession, though the limitation to them was expressly for their lives without impeachment of waste, yet they had an estate tail with all its incidents until severance by the birth of issue; upon which event, having been tenants in tail before, they became tenants for life without impeachment of waste, with remainder to their issue male, &c. Therefore by virtue not only of those words, 'without impeachment,' &c., but also by virtue of the incidents to the estate tail in possession, there being no trustees to preserve, &c., they might have barred all the remainders behind, and had all the rights of tenant in tail in possession." *Williams v. Williams*, 15 Ves. 424.

With regard to the quantity of this estate, it is shown in the principal case, from various incidents, that it is the same as that of tenant for life (ante, p. 23); it is also shown that a tenant in tail after possibility of issue extinct, has certain qualities and privileges annexed to his estate, such as a tenant in tail has, and a tenant for life has not. The principal and perhaps the only one of any importance at the present day is that he is dispunishable for voluntary waste, as for cutting timber; and although there was once a doubt upon the subject (4 Co. 63 a), it seems that he is also entitled to the property of the timber he may have cut. *Williams v. Williams*, 15 Ves. 419; 12 East, 209.

The privileges of the tenant in tail after possibility of issue extinct, are in respect of the *privity of his estate*, and of the inheritance that was once in him; if, therefore, he convey his estate over to another, such person will be considered as a mere tenant for life. Co. Litt. 28 a; *George ap Rice's Case*, 3 Leon. 241.

It may be here mentioned that the power of disposition given by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74) does not extend to tenant in tail after possibility of issue extinct. Ib. s. 18.

4. *Curtesy.**Of what Property a Man can be Tenant by the Curtesy.*

Where a woman is seised of an estate of freehold of inheritance either in fee simple or fee tail, her husband (who by virtue of his marital right would be entitled to the estate for *her* life only) will, upon birth of issue which might by possibility inherit the estate, be entitled to an estate for his own life, as tenant by the curtesy (Litt. ss. 35, 52); "as high an estate," as is observed in *Lewis Bowles's Case*, "as that of lessee for life." And curtesy being an inseparable incident annexed by law to the estate of inheritance of a woman, it cannot be barred by condition. *Sir Anthony Mildmay's Case*, 6 Co. 41 a; Co. Litt. 224 a.

There can be no curtesy of copyholds, since the tenant has a mere estate at will in them (Gilb. Ten. 288; 4 Rep. 22 a), except by custom, which will be construed strictly. Cro. Eliz. 361; 2 Leon. 208.

Nor will there be curtesy of a reversion or remainder in fee expectant upon an estate of freehold, unless the particular estate determine during the coverture (Co. Litt. 29 a); nor of an estate pour autre vie. *Stead v. Platt*, 18 Beav. 50.

Where contingent remainders which do not take effect intervene between an estate for life and the reversion in fee in the wife, as the two estates will coalesce, the husband will be entitled as tenant by the curtesy; but if the contingent remainders take effect, the estates will again open to let in the contingent remainders, and thus the wife would have a mere life estate, of which the husband could not be entitled to curtesy. Thus in *Boothby v. Vernon*, 9 Mod. 147, it is said by the Court, that where an estate for life is limited to a woman, remainder to her first and every other son in tail male, remainder to the heirs of her body, remainder to her right heirs; here it is plain that she is seised of the inheritance; yet if she hath a son, her husband shall not be tenant by the curtesy, because the contingent estate which is to arise upon her death intervenes between her estate for life and the inheritance. See also Year Book, 1 Edw. 3, pl. 14, 15.

The husband will be entitled as tenant by the curtesy, although an estate tail may have determined by the death of the issue as well as the wife (*Paine's Case*, 8 Rep. 34; *Steadman v. Pulling*, 3 Atk. 423, 427; Co. Litt. 30 a), or although the estate in fee simple of the wife, being subject to devise over, may have determined by the happening of the event upon which it was given over, as, for instance, the death of the wife under twenty-one without issue. *Buckworth v. Thirkell*, 3 Bos. & Pull. 652, n.

The husband will be tenant by the curtesy when his wife is one of several coparceners or tenants in common; *secus* if she be one of several joint tenants. Litt. s. 45; 2 Roll. Abr. 90, pl. 50.

So likewise of incorporeal hereditaments of which the wife is seised, as a rent, advowson, common. Co. Litt. 30 b.

Curtesy of an equitable Estate.

Courts of Equity, acting by analogy to Courts of Law, have held that the

husband is entitled as tenant by the curtesy when the estate of inheritance of the wife is equitable, as when it is a trust estate of land (*Watts v. Ball*, 1 P. Wms. 108), or of money to be laid out in land (*Cunningham v. Moody*, 1 Ves. 174; *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 Bro. C. C. 404), or an equity of redemption (*Casborne v. Scarfe*, 1 Atk. 603; 7 Vin. Abr. 156; 2 J. & Walk. 194). And the mere fact that the rents and profits are directed to be paid to the wife during coverture, to her separate use, will not exclude the husband on her death from the enjoyment of his general right as tenant by the curtesy in the equitable inheritance of his wife. See *Roberts v. Dixwell*, 1 Atk. 607; *Pitt v. Jackson*, 2 Bro. C. C. 51; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; overruling on this point *Hearle v. Greenbank*, 3 Atk. 715.

The husband, however, may be excluded from curtesy by express terms. Thus in *Bennet v. Davis*, 2 P. Wms. 316, where a man devised lands to his daughter for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived, but that they should upon the wife's death go to her heirs, it was held by Sir Joseph Jekyll, M. R., that although at law the husband might be tenant by the curtesy, yet he was merely a trustee, and was bound to convey to a trustee for the separate use of the wife and to her heirs. The husband, however, will not be excluded from his right to curtesy unless the intention be clear. *Steadman v. Pulling*, 3 Atk. 423, 427.

Courts of Equity acting by analogy to Courts of Law require an equitable seisin in order to entitle the husband to be tenant by the curtesy of the wife's equitable estate, as receipt of the rents and profits by the husband. *Casborne v. Scarfe*, 1 Atk. 603; 7 Vin. Abr. 156; *De Grey v. Richardson*, 3 Atk. 472; *Casburne v. Inglis*, 2 J. & W. 194; 4 Hare, 405. And see *Watts v. Ball*, 1 P. Wms. 108; *Stone v. Godfrey*, 1 Smale & Giff. 590; 2 Eq. Rep. 866.

If, however, the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or, if both the trustee and cestui que trust are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. *Parker v. Carter*, 4 Hare, 400, 416.

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under a settlement during the whole period of coverture, yet the possession of the estate in conformity with the equitable interests of the cestui que trusts, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. *Parker v. Carter*, 4 Hare, 400.

So the possession of the cestui que trust under the trusts of a settlement is the possession of the trustee and gives him a seisin of the estate, which is not interrupted by the death of the cestui que trust, but immediately enures for the benefit of the person next entitled to the equitable interest, and, notwithstanding the adverse possession of another party soon afterwards commenced, the Court cannot presume such adverse possession to have commenced so instantaneously on the death of the first cestui que trust, as wholly to exclude the equitable seisin of the parties next entitled to the beneficial interest. *Ib.*

Legal Marriage requisite.

Legal marriage is essential before a man can claim as tenant by the curtesy. *Co. Litt. 30 a.*

Formerly, if a man married and had issue by an idiot, found so afterwards by office, the lands might be seised by the king, for as the title of tenancy by the curtesy and of the king began at one instant, the title of the king was preferred (*Co. Litt. 30 b*); but now, as the marriage would be void *ab initio*, the title of the husband by curtesy would never arise (*Morrison's Case*, cited 1 Hag. Consist. Rep. 417). It may be here mentioned that the husband will not be allowed to take by curtesy if he be an alien, unless after naturalization, which, as the effect thereof is retrospective, it is immaterial whether the issue be born before or after (*Fish v. Klein*, 2 Mer. 432; *Fourdrin v. Gowdey*, 3 My. & K. 401), or unless he be made a denizen, in which case, unless where the issue was born abroad and therefore not entitled to inherit lands in this country (*Doe v. Jones*, 4 T. R. 300), it seems that the husband would be entitled to curtesy, although the issue had been previously born, at any rate of lands acquired by his wife since he became a denizen. See 1 Bright, *Hus. & Wife*, 125, 126.

Seisin requisite.

There must, however, be an actual seisin, or seisin in deed of the wife, as Coke terms it, where it is attainable. Thus, if a wife having had issue dies before she made an entry upon her inheritance, the husband, although she was seised in law, will not be tenant by the curtesy (*Co. Litt. 29 a*; 6 T. R. 680); though if the seisin be but momentary it will be sufficient (*Parker v. Carter*, 4 Hare, 418). So if the wife after having had seisin was disseised before marriage, and no entry is made during the coverture, the husband will not be entitled as tenant by the curtesy (*Perk. s. 458*); *secus* if the disseisin took place after marriage (*Ib.*). Although formerly the possession of the tenant in common was the possession of all so as to entitle the husband of one of them to be tenant by the curtesy (*Sterling v. Penlington*, 7 Vin. Abr. 150, pl. 11); the law is now altered. 3 & 4 Will. 4, c. 27, s. 12.

Seisin at law will be sufficient, if actual seisin is unattainable. Thus where a man dies seised of an advowson or rent in fee which descends to a daughter, a married woman, who hath issue, and dies seised before the rent became

due or the church became void, although she had but a seisin in law, her husband will be tenant by the curtesy, because he could by no industry attain to any other seisin. *Et impotentia excusat legem* (Co. Litt. 29 a). But if the advowson be appendant to a manor, and there have been no entry upon the manor during the coverture, the husband shall not be tenant by curtesy of the advowson which is merely accessory to the manor of which seisin might have been had. Note to Co. Litt. 29 a; Hale's MSS.

Upon the same principle if the inheritance of the wife be subject to a lease for years, actual entry or receipt of the rents is unnecessary to entitle the husband as tenant by the curtesy, inasmuch as the possession of the lessee is the possession of the wife. *De Grey v. Richardson*, 3 Atk. 469; and see Co. Litt. 29 b.

Birth of inheritable Issue requisite.

The wife must have issue by the husband, such as by possibility may inherit the estate, otherwise the husband will not be tenant by the curtesy. Thus if an estate limited to a woman and the heirs male of her body, and she have issue only a daughter, the husband will not be tenant by the curtesy, as the daughter could not by possibility inherit the estate (Co. Litt. 29 b). So if an estate be limited to a woman and the heirs of her body by A. her then husband, and upon the death of A. she marries B., although she has issue by B., yet as such issue could not by any possibility inherit the estate, B. will not be tenant by the curtesy (Perk. s. 465; 8 Co. 35 b; Co. Litt. 29 b). *Secus* if the wife had been seised in fee of an estate, even if there had been issue by the prior marriage (2 Bro. Tenant per le Curtesy, 8). Nor will the husband be tenant by the curtesy where the issue do not take by descent. Thus in *Sumner v. Partridge*, 2 Atk. 45, where there was a devise to A. and her heirs, and if she died before her husband he was to have 20l. a year for life, remainder to her children, the wife had issue and died before her husband: it was held, by the Hon. John Verney, M. R., that the husband was not tenant by the curtesy. "A tenancy by the curtesy," said his Honor, "must arise out of the inheritance, which must vest in the wife, and there must be a possibility of its descending upon the children; now they take here by virtue of the remainder over, not by descent from the mother, and there is no difference between making an estate of inheritance to cease in the wife the moment she dies, and to arise in the children, and a joint tenancy." See also *Parker v. Barker*, 2 Sim. 249, 252.

The issue must be born during the marriage, therefore where the child is born after the death of the mother, as is the case when the cesarean operation has been performed, it is said the husband will not be tenant by the curtesy (*Paine's Case*, 8 Co. 35 a; Co. Litt. 29 b). But if issue be born either before the wife was seised, and entry is afterwards made, or even if issue have died in the life of the father before descent of the land he will nevertheless be tenant by the curtesy. Co. Litt. 29 b.

The issue must be born alive, but it is not essential that the child should be heard to cry out, as that is only one of the proofs that it is born alive, as

motion, stirring, and the like, may be sufficient, especially when we consider that a child may be born dumb. Co. Litt. 29 a.

There is an exception to the general rule as to the necessity of the birth of issue in order to confer an estate by curtesy in the case of lands of gavelkind tenure; for in that case a husband who outlives his wife, whether he may have had issue by her or not, will, as long as he remains unmarried, be entitled for life to a moiety of the estate. Co. Litt. 30; Dav. 50; 2 Sid. 153; Rob. Gavelk. b. 2, c. 1.

Death of Wife requisite.

Although for some purposes the estate of tenant by the curtesy is inchoate during the life of the wife, it is not complete until her death. Co. Litt. 30 a.

5. *Dower.*

Tenancy in dower at common law may now be generally defined as being the estate that a widow (if not barred of such estate) is entitled to for her life in one-third of the hereditaments, which her husband is entitled to in fee simple or fee tail, and which her issue, if any, might by possibility inherit.

Dower is given to a woman for the sustenance of herself and the nurture and education of her children. Co. Litt. 30 b.

The law relating to dower has been very materially altered by the Dower Act (3 & 4 Will. 4, c. 105), as to women not married on or before the 1st day of January, 1834; it will therefore be necessary to state the law, both before and after the passing of that act.

Before examining the requisites to dower we must see out of what kind of property a woman will be entitled to dower.

Out of what Property and Estate a Woman is entitled to Dower.

The widow will be entitled to dower, not only out of corporeal hereditaments of the husband, such as lands and houses, but also out of shares in public companies, being real estate (*Buckeridge v. Ingram*, 2 Ves. jun. 651; *Drybutter v. Bartholomew*, 2 P. Wms. 127), mines (*Stoughton v. Leigh*, 1 Taunt. 402), a mansion-house, though in its nature indivisible (*Gerrard v. Gerrard*, Ld. Raym. 72, 5 Mod. 64); and also out of incorporeal hereditaments, such as the profits of stallage, of a fair, of the office of Marshalsea, of keeping a park, of a piscary (Co. Litt. 32 a); so likewise out of rents (Ib. Perk. s. 347), advowsons appendant or in gross (Co. Litt. 32 a; *Howard v. Cavendish*, Cro. Jac. 621), or commons (Co. Litt. 32 a), unless they be without stint. Co. Litt. 30 b, 30 a; Perk. s. 341.

A widow, however, will not be dowable out of real estate purchased in the name of her husband, with partnership property for the purposes of partnership in trade, inasmuch as it is considered in equity, to all intents and purposes, as personal estate, and, therefore, not liable to dower (*Phillips v. Phillips*, 1 My. & K. 649; *S. C.* more fully stated, Bisset on Partnership, p. 50, with some very able observations, elucidating the law on this subject. And see 1 L. Cas. Eq. 130—137). Nor is a widow entitled to dower out of a mere annuity not issuing out of land or tenements, although

it be made payable to a man and his heirs, as out of the Post-office revenues (*Lady Holderness v. Marquis of Carmarthen*, 1 Bro. C. C. 377), nor out of a subsisting rent or duty. *Earl of Stafford v. Buckley*, 2 Ves. 170; *Aubin v. Daly*, 4 Barn. & Ald. 59.

The quality of the property may be so affected by the election of third parties as to deprive the widow of dower. Thus if even previous to the Dower Act the husband had before marriage given another person the option of purchasing certain land, if the option was exercised the land would thereby be converted into personalty, of which the widow could not claim dower, though otherwise she would be entitled to it. 7 Ves. 436, *Townley v. Bedwell*, 14 Ves. 591.

Again, in certain cases she must exercise her own option of what she will be endowed; if, for instance, her husband has made an exchange of lands she will not be dowable both of the land given and the land taken by her husband in exchange, she must elect to be dowable of one of them. Co. Litt. 31 b; Perk. s. 319.

It must be remembered now that the dower of women not married on or before January 1st, 1834, will be defeated by the alienation of her husband, 3 & 4 Will. 4, c. 105, ss. 4, 14.

The estate of the husband, in order to give his wife a title to dower, must be the *entire* inheritance either in fee or in tail. Hence, a woman cannot be dowable of a reversion in fee where a previous life interest is in existence (Co. Litt. 32 b; 1 Roll. Abr. 677; *Duncomb v. Duncomb*, 3 Lev. 437; *Darcy v. Blake*, 2 S. & L. 387), nor where an estate for life or in tail intervenes between the life interest and inheritance of the husband (Perk. s. 335; 1 Roll. Abr. 677, pl. 15; *Doe d. Jones v. Jones*, 1 B. & C. 244); unless those estates terminate during the coverture, either by the death of the tenant for life or the death of the tenant in tail without issue, in which case, as the husband would have the whole of the inheritance, dower would attach. Perk. s. 337.

If, however, the intervening estate be vested in the wife during coverture, and she disclaim it (*Butler v. Baker*, 3 Co. Rep. 27; *Townson v. Tickell*, 3 Barn. & Ald. 31), or if the interposed interest be merely a chattel as a term of years (*Bates v. Bates*, Ld. Raym. 327), or a devise to executors for payment of debts previous to the inheritance to the husband (Co. Litt. 42 a), the widow would be entitled to dower, although in the latter cases she could not claim the enjoyment of it until the expiration of the term or until the debts of the deviser were paid off. *Hitchens v. Hitchens*, 2 Vern. 403; Perk. s. 335.

It seems that if the inheritance of the husband were dependent upon a contingent estate tail, if that did not vest, or if previous to 8 & 9 Vict. c. 106, the inheritance had descended upon the husband tenant for life, and merged therewith so as to destroy a previous contingent remainder dependent upon the estate for life (*Hooker v. Hooker*, Cas. t. Hardw. 13; *Crump v. Wooley*, 7 Taunt. 362; 2 Barn. K. B. 200, 232, 379), the widow would

be entitled to dower. Now, however, since 8 & 9 Vict. c. 106, the contingent remainders would not be destroyed.

If the husband have a general power of appointment, previous to his estate of inheritance, his widow will be entitled to dower if the power be not exercised (*Cunningham v. Moody*, 1 Ves. 174; *Smith v. Camelford*, 2 Ves. jun. 698; *Doe v. Martin*, 4 T. R. 39; *Doe v. Weller*, 7 T. R. 478; *Maundrell v. Maundrell*, 10 Ves. 263, 265); but if he divest himself of his inheritance by the exercise of the power, even under the old law, his widow's claim to dower will be defeated. *Maundrell v. Maundrell*, 10 Ves. 265; *Ray v. Pung*, 5 Madd. 310; 5 Barn. & Ald. 561.

In general a widow will be entitled to dower of a defeasible estate of her husband so long as it exists: thus, under the old law, and when feoffments had a tortious operation, where a husband tenant for life made a feoffment in fee his widow would, as against the feoffee, be entitled to dower, because he having taken an estate in fee could not allege that the husband had only a limited interest, although her right would cease upon the entry of the person entitled in remainder or reversion after the determination of the life interest (*Taylor's Case*, cited 1 Sir Wm. Jones, 317). So under the old law, where a tenant in tail conveyed his estate by fine to a purchaser in fee, as the fine would bar the issue of the tenant in tail, but not those in remainder, the widow of the purchaser would be entitled to dower as long as there were issue of the tenant in tail; on failure of issue the remainderman might enter upon the estate and hold it free from her claim of dower (*Seymour's Case*, 10 Rep. 95 b, 96; *Doe d. Neville v. Rivers*, 7 T. R. 278). The widow will be entitled to dower, although the estate of her husband determines by escheat for want of heirs (Jenk. 5). Where, however, the estate of the husband is defeated by a paramount title, as if he had been a disseisor, and the disseisee had entered upon him, the widow of the disseisor will be unable to claim dower. Litt. s. 393.

We have before seen that the widow of a tenant in tail will be entitled to dower, although the estate tail end on account of there being no issue; the reason is, that the estate of dower "is not derived merely out of the estate of the husband, but is created by the law, and by privilege and benefit of the law is annexed to the gift to him. *Paine's Case*, 8 Co. Rep. 36 a.

Hence, if an estate be given to a man in fee, with an executory limitation over if he should have no issue, his wife will be entitled to dower, notwithstanding he may have died without issue (*Moody v. King*, 2 Bing. 447). Where Best, C. J., in giving judgment, observed that it had been said at the bar, that if the widow in such a case was held entitled to dower you must take it out of the estate of the person who had the executory devise, to whom she was a perfect stranger; that, however, was not so, as dower was part of the estate of the husband, as it was part of tenant in tail's estate, who died without issue, and not that of the remainderman. See also *Buckworth v. Thirkell*, 3 Bos. & Pull. 652, n. (a).

We must now consider what are the requisites to dower.

Legal Marriage requisite.

First. There must be a legal marriage in order to entitle the wife to dower (Mod. 226; Perk. s. 304); but if it be only voidable, until it have been legally dissolved, her right will still remain (*Rennington v. Cole*, Noy's Rep. 29; and see Co. Litt. 33a); and an alien woman on marrying a natural-born subject is entitled to all the rights of an Englishwoman. Co. Litt. 31 b, note 9; and see 7 & 8 Vict. c. 66.

Possibility that Issue of Wife might inherit requisite.

Secondly. It is essential that the hereditaments of the husband be such as that the issue of the wife, if any, may by possibility inherit. Thus if lands be settled upon a man and the heirs of his body by a woman, then his wife, and he die during her lifetime, without issue by her, she will nevertheless be entitled to dower, as she might have had issue inheritable to the lands. If, however, in the case put, the wife died first, and the husband married again, the second wife would not be entitled to dower, because her issue could by no possibility inherit (Litt. s. 53). And the advanced age of the wife, or the tender age of the husband, at the time of the marriage, will be no objection to her claiming dower, as the law will not presume an impossibility of her having inheritable issue. Co. Litt. 40 a.

Seisin of Husband under the old Law requisite.

Thirdly. Another requisite to dower under the law before the Dower Act (which is inapplicable to women married on or before January 1, 1834) is *seisin* of the husband before his death; but in this respect, differing from tenancy by the curtesy, actual seisin is not indispensable. If, for instance, lands and tenements descended to the husband, and he died before entry, although he had only a seisin in law, nevertheless the wife would be entitled to dower: "for," observed Coke, "it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land, when he is to be tenant by the curtesy, which is worthy the observation." Co. Litt. 31 a.

Where, however, before the act, the husband had no seisin at law, a mere right of entry (Perk. ss. 368, 369), or right of action (Perk. ss. 370, 375), would not give his widow a right to dower.

Under the Dower Act, "when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced." 3 & 4 Will. 4, c. 105, s. 3.

The seisin of the husband must, previous to the Dower Act, have been *sole*; and indeed, subsequent to the act, the wife is only dowable of lands of

which her husband was solely *entitled*. Thus if a husband was one of two *joint tenants* in fee, and he either conveyed away his interest, or died so that it survived to the other, his widow neither before nor after the act would be entitled to dower (Co. Litt. 30, 31 b); of course if the husband were the survivor his wife would be entitled to dower (*Broughton v. Randall*, Cro. Eliz. 503). Where, however, the husband is one of two or more tenants in common his wife will be entitled to dower, inasmuch as each has a several freehold and inheritance descendible to his heir (Co. Litt. 37 b); and after a partition a widow will be entitled to dower of the entirety allotted to her husband. *Reynard v. Spence*, 4 Beav. 103.

The necessity for a sole seisin of the husband during the old law gave rise to many devices among conveyancers, in order to prevent the right to dower attaching upon land purchased by a man, by conveying it to him and a trustee jointly in various manners, in order to prevent the obstacles to alienation which might arise from the wife being unwilling to release her right to dower, and also the expense which was necessarily occasioned by her doing so, by joining with her husband in a fine or recovery, the only mode by which formerly (before 3 & 4 Will. 4, c. 74) that object could be effected. See Hayes's *Introd.* 259, 260.

The usual limitations, however, by which dower was prevented from attaching upon hereditaments, was by their conveyance to such uses as the owner should appoint, and, in default of appointment, to him for life; and, on the determination of his estate in his lifetime, to a trustee and his heirs for the life of the owner, in trust for him; and, on the determination of the estate of the trustee, to the owner and his heirs. These were termed common uses to bar dower, and by their means the owner was enabled to alien without the assistance of his trustee, for an execution of the power entirely defeated the subsequent uses. *Ib.* 261, 262.

Under the old law the estate of which the husband was seised must have been *legal*, in order to entitle the wife to dower; she was not therefore dowable of an equity of redemption, of an estate mortgaged in fee (*Dixon v. Saville*, 1 Bro. C. C. 326), nor of a trust estate (*Darcy v. Blake*, 2 S. & L. 387), where either the mortgage had been made or the trust created before the marriage, except perhaps in cases where the legal estate had been fraudulently conveyed away for the purpose of defeating dower. *Gilb. Lex Præc.* 267; see however *Swannock v. Lyfford*, Co. Litt. 208 a, n. 1.

Upon a merger, however, of the legal and equitable estates of inheritance during the coverture, the wife will even under the old law be dowable (*Selby v. Alston*, 3 Ves. 339); but the union of the legal and equitable estates must be complete (*Knight v. Frampton*, 4 Beav. 10), and commensurate (*Lyster v. Mahony*, 1 Dru. & Warr. 236; see however *Lloyd v. Lloyd*, 4 Dru. & Warr. 354, 370), where Lord St. Leonard's (then Lord Chancellor of Ireland) held, that where there was vested in the husband during coverture a bare legal fee simple upon which dower would attach at law, and an equitable

estate tail, inasmuch as the whole legal fee simple would be exhausted to the extent of the equitable estate tail, and as the estate tail if legal would be liable to dower, in such case the widow would be entitled to dower, as a Court of Equity would not prevent her from enforcing her right at law. See also *S. C.* 2 Conn. & Laws. 592.

Where the husband has a bare legal estate, either as mortgagee in fee, after the estate has become absolute at law (*Park, Dow.* 100), or as trustee (*Noel v. Jevon*, Freem. Ch. Rep. 43; *Nash v. Preston*, Cro. Car. 191; 1 Roll. Abr. 679, pl. 50), as, for instance, where he has contracted to sell the estate before coverture, in which case he is a trustee for the purchaser (*Lloyd v. Lloyd*, 2 Conn. & Laws. 592; 4 Dru. & Warr. 355); the widow, although she may be entitled at law to dower, will be restrained from proceeding there by a Court of Equity (*Noel v. Jevon*, Freem. 43; *Lloyd v. Lloyd*, 2 Conn. & Laws. 599; 4 Dru. & Warr. 370), unless it appears that the trust is a mere fraudulent contrivance to defeat the creditors of the husband, who is the real owner of the estate (*Bateman v. Bateman*, 2 Vern. 496, Raithby's Ed.), and if the husband even after marriage enters into a valid contract to sell his equitable estate, the wife will not be entitled to dower, merely because *subsequently* the legal estate vested in the husband. 4 Dru. & Warr. 370.

Although at the time a widow of a mortgagee in fee makes her claim to dower, in consequence of the lapse of time and other circumstances there may be no person entitled to redeem, yet if that state of things did not exist at the time of the husband's death his widow will not be entitled to dower. *Flack v. Longmate*, 8 Beav. 420.

We have before seen that a husband is entitled to curtesy of his wife's equitable estates; in order, therefore, to put an end to an anomaly, operating very unfairly towards women, it was enacted by 3 & 4 Will. 4, c. 105, "that when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in *equity* to dower out of the same lands." Sect. 2.

Under the old law, where there was a legal term for years, created before the right to dower attached, the widow could, at *law*, only obtain judgment with a *cesset executio* during the term (*Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246). In the case, however, of a satisfied term, a Court of Equity would prevent either the heir or devisee of the husband, or any other *volunteer*, from setting it up at law (*Ib.*); but not a purchaser for *valuable consideration*, even with *notice*, of the right to dower (*Mole v. Smith*, 1 J. & W. 665); and upon a sale would even compel him to accept the title and to take an assignment of the term, as a sufficient protection against dower (*Ib.*). It must be remembered that, after the 31st Dec. 1845, satisfied terms, upon becoming attendant on the inheritance, absolutely determine. 8 & 9 Vict. c. 112.

It may be here mentioned, that dower *ad ostium ecclesiæ*, and dower *ex assensu patris*, which are fully described, Co. Litt. 34 a—37 b, are now abolished, 3 & 4 Will. 4, c. 106, s. 13; Dower *de la plus beale* (Co. Litt. 38 a, 39 b), being merely a consequence of tenures by Knights' service, was virtually abolished by the statute 12 Car. 2, c. 24, which converts such tenures into socage.

How Dower barred.

Before the Statute of Uses (27 Hen. 8, c. 10), a man could not prevent dower from attaching to a *legal* estate of which he was seised; but the only mode by which he could prevent his wife from claiming dower, and one which was very general, was by vesting the legal estate in feoffees who (if desired so to do) conveyed to the wife an estate in lieu of dower, in other words, a jointure. *Vernon's Case*, 4 Co. Rep. 2.

When the Statute of Uses was passed, by which the seisin was transferred to the use, it was thought necessary to prevent widows having dower in addition to their jointures, and also to enable men in future to make valid jointures, so as to prevent dower attaching to a legal estate. It was therefore, by sects. 6, 7, 8 and 9 of the Statute of Uses in effect enacted, that where a woman had a jointure, she should not be entitled to her dower also; but if she were evicted of her jointure, her dower should revive; and that if the jointure should be made after marriage, she should have her election, when the coverture had ceased, to have either her dower or her jointure, but not both.

To constitute a valid legal jointure within the statute, six things are requisite:—First, that the jointure by the first limitation is to take effect for the widow's life in possession of profit presently after the decease of her husband. Secondly, that it be for the term of her own life or greater estate. Thirdly, it must be made to herself and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. And sixthly, it may be made either before or after marriage, but if it be made after marriage she may waive it (Co. Litt. 36 b; and see *Vernon's Case*, 4 Co. Rep. 2; 1 Chitt. Stat. 1085, and cases there cited); and a proper jointure before marriage would be binding upon the wife although an infant at the time of the marriage (*Buckinghamshire v. Drury*, 2 Eden, 57), and if a jointure be competent, it will be good although not in proportion to the value of dower. *Ib.*; see *Wilm. Op.* 209; *Harvey v. Ashley*, 3 Atk. 612.

Dower, however, may, since as well as before the Statute of Uses, be barred by a provision, which would be enforced in equity, and this equitable bar does not proceed upon any analogy to the legal bar, but rests upon the foundation of *contract*; thus, for instance, where an agreement has been made between husband and wife *before* marriage, by which another provision was substituted for it, such agreement will be enforced by a

Court of Equity, even where the wife was a minor, if the provisions were made with the assent of her father or guardian, whatever may be the nature of the property, and even though the provision in lieu of dower may have failed (*Buckinghamshire v. Drury*, 2 Eden, 74; *Corbet v. Corbet*, 1 S. & S. 621). In *Dyke v. Rendall*, 2 De Gex, Mac. & Gord. 209, by a settlement made on the marriage of an adult female, it was declared, that in consideration of the intended marriage, and for providing a competent jointure and provision of maintenance for "the wife and the issue of the marriage," the father of the husband had paid to him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife, and the issue of the marriage. During the coverture the husband bought certain lands, which he subsequently sold to a purchaser, from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill filed by the wife for dower out of the lands so sold, it was held by Lord St. Leonards, C. (overruling *Power v. Sheil*, 1 Moll. 296), that her right was barred by the settlement, and that she had no lien on, or right to resort to, the lands for the satisfaction of the amount due on the bond. "If the present," said his Lordship, "were a jointure operating as a bar under the Statute of Uses, the case would have been governed by the 7th section of that statute, but in equity the bar rests solely on contract, and my opinion is, that in this court, if a woman being of age, accepts a particular something in satisfaction of dower, she must take it with all its faults, and must look at the contract alone, and cannot, in case of eviction, come against any one in possession of the lands, on which otherwise her dower might have attached; this has nothing to do with the performance of covenants and the like. . . . My conclusion is, that the plaintiff has accepted in lieu of dower payment of money at least, and that she is also concluded by the acceptance of the bond, and although the bond was not satisfied, that she has no right to resort to the lands of her husband bought after and sold during the marriage." See also *Williams v. Chitty*, 3 Ves. 545; *Rose v. Reynolds*, 1 Swanst. 446, n. *Lacy v. Anderson*, Ib. 445, n.; *Vizard v. Longden*, 2 Eden, 66; *Birmingham v. Kirwan*, 2 S. & L. 444, 452; *Hamilton v. Jackson*, 2 J. & L. 295. But it seems that where the woman was a minor, any provision made at the time of her marriage, in order to bar her legal right to dower, must not be merely a precarious and uncertain provision which she may never enjoy. *Carruthers v. Carruthers*, 4 Bro. C. C. 499, 513; *Smith v. Smith*, 5 Ves. 188.

Although a provision in lieu of dower will not at law bar the wife against claiming freebench in copyholds, as they are not within the Statute of Uses, nevertheless it will operate as a bar in equity. *Walker v. Walker*, 1 Ves. 54; *Jordan v. Savage*, Bac. Abr. "Dower," G 5.

Where the husband makes a provision for the wife *subsequently* to marriage, she will not be bound thereby, although it be expressly in lieu of dower; but a Court of Equity will not allow her to take both provisions,

and will compel her to elect between them. See Mr. Swanston's note to *Dillon v. Parker*, 1 Swanst. 395.

And even if a husband may not have expressly stated that a certain provision was in lieu of dower, nevertheless if it were inconsistent with the assignment of dower by metes and bounds, a Court of Equity will put the widow to her election. See 1 L. Cas. Eq. 239. See also the recent cases, *Parker v. Sowerby*, 4 De Gex, Mac. & Gord. 321 (overruling *Warbutton v. Warbutton*, 2 Sm. & Giff. 163); *Parker v. Sowerby*, 1 Drew. 488; *Gibson v. Gibson*, Ib. 43; *Nottley v. Palmer*, 2 Ib. 93; *Pepper v. Dixon*, 17 Sim. 200.

With regard to women married since the 1st January, 1834, questions of election will less frequently arise, as dower may now be more readily barred by the husband under the Dower Act; and by the 9th section of that act it is enacted, "that where a husband shall devise any land out of which his widow would be entitled to dower, if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will." And by the 10th section it is enacted, "that no gift or bequest made by any husband, to or for the benefit of his widow, of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall appear."

As to jointures made in execution of a power. See Sugd. Pow.

As to performance of a covenant to settle a jointure. See note to *Wilcocks v. Wilcocks*, and *Blandy v. Widmore*, 2 L. Cas. Eq. 305.

The right of the widow to dower, might, as we have before observed, be barred by several forms of conveyancing which prevented dower from attaching; but those generally adopted were the uses to bar dower, which have already been mentioned, ante, p. 46.

Formerly, where the right of dower had attached to lands, the wife either by levying a fine alone (*Portington's Case*, 10 Co. Rep. 43), or joining with her husband in a fine or recovery, might have passed her interest in them (*Lampet's Case*, 10 Co. Rep. 49), unless she joined for a limited object merely, as a mortgage (Ib.; *Doe v. Coltman*, 1 Vern. 294; *Anon.*, 2 Eq. Ca. Abr. 385; *Jackson v. Parker*, Amb. 687), and it was immaterial whether the declaration of uses were executed before (*Beckwith's Case*, 2 Co. Rep. 57) or after (*Swanton v. Raven*, 3 Atk. 105; *Beckwith's Case*) the levying of the fine; provided the declaration was according to the intent with which the fine was levied. And now a woman married on or before the 1st January, 1834, may, by deed acknowledged according to the provisions of the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74, ss. 68—82), bar her right of dower.

With regard to any woman married *after* the 1st January, 1834, her right to dower is entirely at the mercy of her husband, since by the Dower Act she will be entitled to no dower out of estates absolutely disposed of by him in his lifetime or by will (s. 4), and priority will be given

to partial interests created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject (s. 5); and the husband may bar dower by a declaration in a deed (s. 6) or will (s. 7), in the latter of which instruments he may render it, subject to any conditions, restrictions or directions (s. 9); but no gift or bequest of personal estate, or of land not liable to dower, will prejudice her right to dower, *unless* a contrary intention be declared by his will. Sect. 10.

However, a covenant or agreement on the part of the husband not to bar dower may be enforced in equity. Sect. 11.

The attainder of the husband for treason, unless he die before judgment (Co. Litt. 390 b, 391), will bar the right of his widow to dower (Ib. 41 a; 5 & 6 Edw. 6, c. 11, s. 13; 39 & 40 Geo. 3, c. 93), both out of lands of which he was seised at the time of the attainder, and out of those which (even before the Dower Act) he had previously aliened, although he may obtain a pardon (*Maynye's Case*, 1 Leon. 3), unless the attainder be reversed by Parliament or for error (Co. Litt. 392; *Menvil's Case*, 13 Co. Rep. 19). Lands, however acquired *after* pardon, will be subject to dower. Perk. s. 387.

However, the attainder and conviction and outlawry of the husband, for murder or felony, will not cause a forfeiture of his widow's dower, 1 Edw. 6, s. 17; 5 & 6 Edw. 6, c. 11, s. 13; Co. Litt. 392 b.

The wife will *forfeit* her right to dower, if she be attainted for treason, murder or felony (Perk. s. 349), unless she obtain a pardon during her husband's lifetime, in which case her right will be renewed. Co. Litt. 33 a, n. 8; 13 Co. 23.

If the wife, in consequence of her misconduct, is divorced from her husband *à vinculo matrimonii*, and not merely *à mensâ et thoro*, or if she elope from her husband and stay with the adulterer, even though she return to, and cohabit with, her husband in consequence of ecclesiastical censure, she will lose her dower; but she will become entitled to it if she be reconciled to him without ecclesiastical coercion. Co. Litt. 32 a, 32 b; see *Menvil's Case*, 13 Co. Rep. 23; *Hetherington v. Graham*, 6 Bing. 135.

Assignment of and Remedies to recover Dower.

As it is not certain of what part of the lands a widow will be endowed, she cannot enter upon them until they are assigned to her by metes and bounds, and this ought to be done within the quarantine or forty days that the law allows the widow to remain in her husband's house after his death; and as dower is of common right, it is not necessary that the assignment should be made by livery of seisin, or in writing (Co. Litt. 34 b, 35 a, *Booth v. Lambert*, Sty. 276; *Rowe v. Power*, 2 Bos. & Pull. N. C. 34); and it must be made by the owner of the freehold (Co. Litt. 34 b), even though an infant (1 Roll. Abr. 681, T. 1), or by one of several joint tenants (Co. Litt. 35 a; Perk. s. 397), even a disseisor (Co. Litt. 35 a; Perk. s. 394), unless he has obtained the freehold through collusion with the widow. Ib.

After proceedings at law dower is assigned by metes and bounds by the sheriff. 2 Wms. Saund. 45 a; 1 Taunt. 412.

An assignment of dower of common right will not be binding upon the widow if it be not absolute; if, for instance, there be an exception of trees growing on the land (*Bullock v. Finch*, 1 Roll. Abr. 682, X 8), or if the estate be not of equal duration to that of dower (*Bickley v. Bickley*, Anders. 287; *Colt v. Coventry*, Hob. 153); but a condition in favour of the widow will be good. *Wentworth v. Wentworth*, Cro. Eliz. 412.

The widow may, if she please, accept an assignment not of common right, as of an undivided third part of lands not distinguished by metes and bounds (*Rowe v. Power*, 2 Bos. & Pull. 1); or of so many acres of land (*Moore*, 59 pl. 167), or of rent issuing out of the land, in lieu of dower (*Turney v. Sturges*, Dy. 91 b; *Bickley v. Bickley*, Anders. 287), and it will be a good assignment to all intents and purposes.

The assignment of lands, or of a rent arising from lands, out of which the widow is not dowable, will not bar her right to dower if made only by parol. Co. Litt. 34 b; Perk. s. 410; *Vernon's Case*, 4 Co. Rep. 1; *Turney v. Sturges*, Dy. 91 b.

Where there is an excess in the assignment of dower, if it were the act of the heir, being of full age at the time, he has no remedy against the dowress for avoiding the consequences of that act (*Stoughton v. Leigh*, 1 Taunt. 412); if, however, he were under age at the time he may have relief by a writ of admeasurement of dower (Co. Litt. 39 a; *Stoughton v. Leigh*, 1 Taunt. 412); but not where the excess in value has arisen in consequence of improvements effected by the widow (Fitz. N. B. 149 c); but the discovery of mines formerly worked, which had been overlooked when the dower was assigned, would be a good ground for the writ. *Stoughton v. Leigh*, 1 Taunt. 412.

Under this writ of admeasurement the sheriff does not make a new assignment, but only restores to the heir what was assigned to the widow over and above that to which she was legally entitled. Fitz. N. B. 148, F.

If the excessive assignment were made by the sheriff in execution of a judgment in dower, the heir might sue out a scire facias to obtain an assignment de novo (*Howard v. Candish*, Palm. 266; Bro. Abr. "Dower," p. 262, pl. 83, 1 Taunt. 412), or if the lands assigned were not in the judgment, the heir or tenant may proceed by ejectment. *Booth v. Lindsey*, Raym. 1293.

As to the jurisdiction of the Court of Chancery in such cases. See *Hoby v. Hoby*, 1 Vern. 218; *Sneyd v. Sneyd*, 1 Atk. 441.

If the widow be evicted from her dower lands, she will be entitled to an assignment de novo. Roll. Abr. 684, C 1; *Bustard's Case*, 4 Co. Rep. 122; Perk. ss. 418, 420.

Where the inheritance is divisible as in the case of lands, a woman on becoming entitled to dower, although she cannot enter upon them, may claim to have one-third assigned to her in severalty by metes and bounds, or one-third of the rents. Where the inheritance is not in its nature divisible, dower

is assigned to her in the most convenient manner; as, for instance, by the third toll dish of a mill, the third sheaf of tithes (previous to their commutation) the third part of the profits of stallage, of a fair, of an office, as that of Marshalsea, or of Courts, fines and heriots, or by the third presentation of an advowson. Co. Litt. 32 a, 32 b.

As to the mode of assigning dower of mines, see *Stoughton v. Leigh*, 1 Taunt. 410.

As to the assignment or setting out of dower, see 1 Bright, 362; Bell, Hus. & Wife, 279.

If the widow is compelled to resort to Courts of justice to enforce her right to dower, she may proceed either at law or in equity, and proceedings in the latter Court, as being by far the most convenient, are generally adopted. *Curtis v. Curtis*, 2 Bro. C. C. 620; *Mundy v. Mundy*, 2 Ves. jun. 128; 1 Bright, 398, 419; Bell, 306.

At common law the widow was entitled to dower only from the time it was assigned; the legislature, however, by the Statute of Merton, 20 Hen. 3, c. 1, and 16 & 17 Car. 2, c. 8, s. 4, gave her arrears of dower in the shape of damages (*Dobson v. Dobson*, Ca. t. Hardw. 19; *Watson v. Watson*, 10 C. B. 3); and in equity she may have an account of the rents and profits (*Curtis v. Curtis*, 2 Bro. C. C. 620) from the death of her husband. The arrears, however, of dower can now be recovered for no longer period than six years before the commencement of an action or suit. 3 & 4 Will. 4, c. 27, s. 41.

Having examined the different kinds of estates for life, we may now proceed to show what is the power which tenants for life have over their estates, and the various incidents thereto.

Alienation and Forfeiture of Estates for Life.

A tenant for life has full power to alien his estate, and it cannot be made inalienable (*Brandon v. Robinson*, 18 Ves. 429) except in the case of property settled to the separate use of a married woman, and then only during her coverture, for upon her becoming discoverd, the restraint upon alienation is void. See *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 405; *Hulme v. Tenant*, 1 L. Cas. Eq. 324 and note.

Tenants for life being bound, as observed in *Lewis Bowles's Case*, "to do fealty," even after the abolition of tenures, by 12 Car. 2, c. 24, their estates were forfeitable, for causes which had their origin in the existence of feuds.

Thus, as under the feudal system, the tenant by renouncing his tenure, as by claiming the reversion himself, acknowledging it to be in a stranger, or accepting it as a gift of a stranger, incurred a forfeiture of his interest, so a tenant for life, who conveyed the entire ownership of the estate, by means of conveyances, which formerly had a *tortious* operation, that is to say, conveyed the whole estate, and not merely the interest of the tenant for life therein, thereby incurred a forfeiture of his life interest. Co. Litt. 251, 252 a.

The conveyances which were formerly tortious, were a feoffment, re-

covery, or fine (unless there were proper words of restriction). However, fines and recoveries are now abolished, and the tortious operation of a feoffment (which, however, is seldom used) is taken away by 8 & 9 Vict. c. 106, s. 4, and it is now a mere innocent conveyance, that is to say, it merely passes the interest of the feoffor.

Tenants for life may however sell and convey the fee of lands required by railway companies (8 & 9 Vict. c. 18, s. 7), and may, under the direction of the Court of Chancery, convey the whole fee, where other parties cannot do so, either by way of sale or mortgage for payment of a testator's debts. 11 Geo. 4 & 1 Will. 4, c. 47, s. 12; 2 & 3 Vict. c. 60; and see 13 & 14 Vict. c. 60, s. 29.

The legislature has also enabled tenants for life by complying with certain regulations to charge the inheritance with money laid out for *draining*, and some other permanent improvements, the principal being paid off by annual instalments (see 8 & 9 Vict. c. 56; 9 & 10 Vict. c. 101; amended by 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; and 13 & 14 Vict. c. 31); but unless under the provisions of those acts, a tenant for life will not have any allowance or compensation made to him for improvements effected upon the property. *Nairn v. Majoribanks*, 3 Russ. 582; *Hibbert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144.

Custody of Title Deeds.

As a general rule the tenant for life is entitled to the custody of title deeds relating to the estate (*Ford v. Peering*, 1 Ves. jun. 72; *Strode v. Blackburne*, 3 Ves. 225; *Bowles v. Stewart*, 1 S. & L. 209); and, if they have been given up to the Court of Chancery, they will be delivered up to him (*Duncombe v. Mayer*, 8 Ves. 320), unless they had been brought in under an order for safe custody (*Webb v. Webb*, 1 Eden, 8; 1 Dick. 298), where, however, the tenant for life has parted with the deeds, the remainderman if he be dissatisfied may come into equity to have them secured (*Ford v. Peering*, 1 Ves. jun. 72; and see *Joy v. Joy*, 2 Eq. Ca. Abr. 284; *Ivie v. Ivie*, 1 Atk. 431; *Smith v. Cooke*, 3 Atk. 382; *Lord Lempster v. Lord Pomfret*, 1 Amb. 154); as they would be when a bill is filed to have a remainder declared good, where it is in dispute (*Southby v. Stonehouse*, 2 Ves. 610; *Papillon v. Voice*, 2 P. Wms. 471). So also in the case of a jointress, provided the party seeking the deeds confirms her in her jointure. *Senhouse v. Earl*, 2 Ves. 450; *Leach v. Trollope*, Ib. 662; *Petre v. Petre*, 3 Atk. 511.

A contingent remainderman will not on a bill filed for that purpose be allowed to obtain inspection of the title deeds in the hands of the tenant for life. *Noel v. Ward*, 1 Madd. 322.

Where, however, the absolute owner of property, who may do what he pleases with his deeds (1 Bro. Abr. 327 b; pl. 86; Co. Litt. 232 a; *Kelsack v. Nicholson*, Cro. Eliz. 496), delivers them over to the remainderman, the tenant for life will not be able to recover them. 2 Bro. Abr. 84 b, pl. 25.

And it seems that where a tenant for life (Dick. 660, 651), or a person entitled to part of the land (4 H. 7, 10; 1 Bro. Abr. 138 b, pl. 53), has possession of the title deeds, the Court will not, at any rate without some good reason, take them out of his hands.

A person entitled to a vested remainder, or his assignee may maintain a suit in equity against the tenant for life, for the sole purpose of the production and inspection of the title deeds and documents relating to the estate in possession of the tenant for life, in order to enable the remainderman or his assignee to deal with his property as he may consider most to his advantage (*Davis v. Earl of Dysart*, 3 Eq. Rep. 599, 602). And if it be suggested that the purpose for which the documents are required is an improper one, the burden of proof will lie upon the person resisting the production (Ib.); where, however, there is a reasonable cause of litigation, with respect to the interest of the plaintiff, the Court of Chancery will not order the production of the title deeds. Ib.

As to Renewals of Leaseholds where there is a Tenant for Life.

Where leaseholds are settled upon a person for life, and there is no direction upon the subject, it is optional with a tenant for life whether he will renew or not (*Nightingale v. Lawson*, 1 Bro. C. C. 443; *Stone v. Theed*, 2 Bro. C. C. 247; *White v. White*, 9 Ves. 554; *O'Ferrall v. O'Ferrall*, Rep. t. Plunk. 79); even, it seems, although the property may be in settlement and vested in trustees (Ib.; *Lawrence v. Maggs*, 1 Eden, 453). Where, however, there is an express direction to trustees or a tenant for life to renew, they must do so (*Montford v. Lord Cadogan*, 17 Ves. 485; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 225); so likewise, where the direction is to be implied from the terms of the instrument creating the interest by the use of expressions which show that a renewal is contemplated. *Lock v. Lock*, 2 Vern. 666; *Hulkes v. Barrow*, Taml. 264.

A mere direction that "it should be lawful for trustees from time to time as occasion should require, and as they should think proper to apply for renewal," gives the trustees a discretionary, and not an arbitrary power to renew or not, and if there be a fair opportunity to renew, the trustees would be compelled to do so. *Lord Milsington v. Earl of Mulgrave*, 3 Madd. 491; 5 Madd. 471.

A trustee who has neglected to renew, where there was an express trust to do so, will either be compelled to renew at his own expense for the benefit of the remainderman (*Lord Milsington v. Lord Mulgrave*, 3 Madd. 491; 5 Madd. 472), or, if the latter has himself obtained a renewal, to repay him the expense thereof (*Montford v. Cadogan*, 17 Ves. 485; 19 Ves. 635; 2 Mer. 3), but only the proper amount, if the terms of renewal were unreasonable (*Colegrave v. Manby*, 6 Madd. 72; 2 Russ. 238); the trustee, however, is entitled to be repaid out of the personal estate of the tenant for life (2 Mer. 3; 19 Ves. 635), and if there have been successive tenants for life, their es-

tates must contribute (2 Mer. 3); a purchaser, however, of the interest of a tenant for life, will not be obliged to repay the trustee, unless he had, on the deed of assignment, express notice that the interest he thereby purchased was subject to the trust for renewal. 19 Ves. 641.

Where, however, a renewal is impracticable, either on account of the absolute refusal to renew, or the refusal to do so save on exorbitant terms, such as the trustees may not be bound to accept (*Colegrave v. Manby*, 6 Madd. 82, 83; *Tardiff v. Robinson*, Ib. 83, n.), the tenant for life will not be allowed to retain that which the settlor never intended him to have; such sums, therefore, as would have been expended in effecting renewals, if practicable, at a reasonable rate, ought to be invested, and held upon the same trusts as the lease. *Colegrave v. Manby*, 6 Madd. 72, 87; 2 Russ. 238; *Bennett v. Colley*, 5 Sim. 181; 2 M. & K. 231.

Where it appears, upon examining the instrument by which leaseholds are settled, that no obligation to renew was intended, the tenant for life may suffer the lease to run out (*Harvey v. Harvey*, 5 Beav. 134); if, however, he chooses to renew, he will be a trustee for all the persons interested under any subsequent limitations. *Rawe v. Chichester*, Amb. 715; *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Clegg v. Fishwick*, 1 Mac. & Gord. 294; 1 L. Cas. Eq. 33, 34, 35, and cases there cited.

If the instrument by which the leaseholds have been settled imposes the obligation to renew and points out the mode by which the expenses of the renewal are to be paid, that mode prescribes the obligations which are intended to be imposed upon the parties claiming under the instrument, and must be followed accordingly. *Hudleston v. Whelpdale*, 9 Hare, 784. Thus where there is a direction to raise the fines out of the annual income, as by the investment of the overplus of the rents (*Stone v. Theed*, 2 Bro. C. C. 243), or a trust to renew out of "rents, issues and profits" (*Shaftesbury v. Duke of Marlborough*, 2 My. & K. 111, 121; *Trench v. St. George*, 1 Dr. & Wal. 417), the lease must be renewed out of the annual income alone; sed vide *Allan v. Backhouse*, 2 V. & B. 65; *Ivy v. Gilbert*, 2 P. Wms. 13, where some similar words were held to authorize a sale or mortgage.

A direction to renew *by and out of the rents and profits or otherwise*, has been held to authorize a mortgage but not a sale; although the mortgagee might afterwards sell (*Garmstone v. Gaunt*, 9 Jur. 78), and where there was a direction to levy the fines *out of the rents and profits, or by mortgage, sale or other disposition* of the premises, it was held, that they were to be raised by sale or mortgage (*Playters v. Abbott*, 2 My. & K. 97, 110). Moreover, a fund for renewal may be provided out of other property. *Richards v. Richards*, 2 Y. & C. C. 419; *Wadley v. Wadley*, 2 Coll. 11.

Where the fines are to be provided out of the rents and profits no difficulty arises in the case of leaseholds *for years*, when the period of renewal is certain, since the trustees may retain an annual sum out of the rents and profits from the tenant for life, so as to insure a due contribution on his part towards the expense of renewal (*Montford v. Cadogan*, 19 Ves.

633; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121). There is however more difficulty in the case of leaseholds *for lives*, the time of renewal being necessarily uncertain, and there are no means of ascertaining the proportion to be borne by the tenant for life until his death; the best mode seems to be that of insuring the lives of the cestui que vies for a sum sufficient to provide for a renewal on the dropping of any life. See *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 124; *Greenwood v. Evans*, 4 Beav. 44.

Although, however, fines are made payable out of the annual rents, it may be a matter of necessity to raise them temporarily by a mortgage. Where, for instance, as observed by Sir John Leach, M. R., in the case of leases for lives, the renewal is to take effect immediately upon the death of the testator; the trustees must, in the first place, have recourse to a mortgage, since no rents can have accrued; and Lord Eldon observes, in *White v. White* (9 Ves. 554), that in such a case there seems to be no other mode of obtaining from the tenant for life his proportion of the expenses of renewal according to his enjoyment, than by compelling him to give security to that effect. If such security be not given, the remainderman could only resort to the uncertain assets of the tenant for life. *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121.

It seems that if there were a direction that the fine should be raised by sale, without more, that the corpus of the estate ought to bear the expense of renewal, and that it was the intention that the entire estate should be settled, subject to the subordinate direction that it was to undergo a perpetual diminution with a view to its being otherwise preserved. *Jones v. Jones*, 5 Hare, 461.

Where there is a direction that the trustees shall raise the fine, either by sale or mortgage, or by the application of rents and profits, or in any other mode which they shall think fit, there the effect as between the parties would be different, according to the mode which the trustees, exercising the power, might adopt. If they raised it out of the annual rents and profits, the manifest effect would be, to throw the charge upon the party in possession, preserving the entire estate. If, on the other hand, they raised it by a sale, then the estate would undergo a diminution of so many acres, the tenant for life losing the rent of the portion sold, and the remainderman losing it in perpetuity. *Jones v. Jones*, 5 Hare, 461, 464.

Where, however, the trustees not acting under the power, the Court of Chancery is called upon to exercise a discretion, the effect of which in one way would be to throw a burden upon one party, and if the discretion be exercised another way, to throw it upon a different party, and there is no reason for adopting one mode rather than the other, it seems that the Court would not throw the burden more upon one party than upon the other, but would apportion it between them. *Jones v. Jones*, 5 Hare, 462, 464, per Wigram, V. C.; see also *Allan v. Backhouse*, 2 V. & B. 65; *Greenwood v. Evans*, 4 Beav. 44.

When the instrument imposes the obligation to renew, and does not point out the mode in which the expenses of the renewal are to be paid, whether the leaseholds be for years or lives (*Jones v. Jones*, 5 Hare, 460: and see *White v. White*, 9 Ves. 554; *Allan v. Backhouse*, 2 V. & B. 65; *Greenwood v. Evans*, 4 Beav. 44), the ordinary way of raising the money in the first place for payment of the fines for renewal, is by a mortgage or sale of part of the estate (*Meynell v. Massey*, 2 Vern. 1; *Allan v. Backhouse*, 2 V. & B. 75; *Earl of Shaftesbury v. Duke of Marlborough*, 2 My. & K. 121; *Reeves v. Creswick*, 3 Y. & C. 715), and the parties themselves must ultimately bear the expense of renewal in proportion to the actual enjoyment they have had or may have of the lease, and not an extent of enjoyment to be determined by mere speculation, or by a calculation of probabilities. *Jones v. Jones*, 5 Hare, 440, 465; *Hudleston v. Whelpdale*, 9 Hare, 775, 786.

Where the sum necessary for effecting a renewal has been raised by mortgage of the estate, the tenant for life will be bound not only to keep down the interest of the mortgage, but to contribute towards paying off the mortgage, in proportion to the actual benefits which he may derive from the renewal; see *White v. White*, 9 Ves. 554; and *Hudleston v. Whelpdale*, 9 Hare, 775, 785, where the sum applied in effecting the renewal was provided out of funds in court, part of the corpus of the estate of the testator by whose will the lease was put into settlement.

If the tenant for life is willing to take upon himself to renew, there is very little difficulty in carrying out the transaction; he will enjoy the estate during his own life, and when the actual period of his enjoyment is ascertained, his estate will have a lien upon the residue of the term for any overpayment which may have been made. *Jones v. Jones*, 5 Hare, 465.

The case is one of much greater difficulty where the renewal is made by or at the expense of the remainderman, or (which as to this difficulty is the same thing) where the trustee is to raise the money and charge it on the corpus. In that case the tenant for life must give security for the benefit which he may derive from the renewal, for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of, leaving the rest to be borne by the parties who may succeed him. *Jones v. Jones*, 5 Hare, 465; *Hudleston v. Whelpdale*, 9 Hare, 786, 787.

With regard to the amount of security to be given by the tenant for life, Sir J. Wigram, V. C., has made the following important observations:—"There is a practical difficulty," said his Honor, "in determining for what sum the tenant for life is to give security. If he gives security for the whole amount of the fine, because by possibility he may enjoy the whole benefit resulting from the renewal, the difficulty is got over; but the tenant for life may not be able to give security for the whole, although he might for a part. I do not think the difficulty in such case is insuperable, the tenant for life may, in the first instance, be required to give security for an amount calculated upon the assumption, that his life will last during a portion of the

renewed lease. If he should die within the time during which it was assumed that his life would last, the security would of course be more than sufficient to satisfy his proportion of the fine, and it would be void for the excess. If he outlived that time, he might be called upon to give a further security to cover the additional proportion then to be attributed to him." 5 Hare, 466; see also *Greenwood v. Evans*, 4 Beav. 44; *Reeves v. Creswick*, 3 Y. & Coll. 715.

The rules relative to copyholds for lives given to persons in succession, are similar to those relating to the renewal of leaseholds for lives. See *Playters v. Abbott*, 2 My. & K. 97.

With respect to the anticipation as to future renewals, the theory appears to be, upon each renewal to look at the property as about to be purchased for the benefit of the settlement, and then to consider in what way the fine for renewal is to be borne by the parties who are to enjoy the lease when renewed. *Jones v. Jones*, 5 Hare, 463.

As to the question whether a tenant for life will be entitled to enjoy leaseholds or other property of a perishable or wasting nature in specie, or whether they must be converted into property of a permanent character, so as to give those taking in remainder an equal chance of enjoyment. See *Howe v. Earl of Dartmouth*, 2 L. Cas. Eq. 225 and note.

As to Payment of Interest on Incumbrances or Principal by Tenant for Life.

As a general rule, a tenant for life, whether conventional or by operation of law, is bound, as far as the rents will extend, to keep down the interest of a mortgage during the time he is in possession (*Hungerford v. Hungerford*, Gilb. Eq. Rep. 69; 5 Ves. 106; *Faulkner v. Daniel*, 3 Hare, 206; *Simpson v. O'Sullivan*, 7 C. & F. 550), a dowress of course being liable only to one-third (*Squire v. Compton*, 2 Eq. Ca. Abr. 387), and the executor of a tenant for life will be liable to his arrears.

Although a tenant in tail in possession is not bound to keep down the interest on a mortgage, because the remainderman is said to be "at his mercy," it has been held that a tenant for life, with an absolute power of appointment, is bound to keep down the interest on charges created by himself. *Whitbread v. Smith*, 3 De Gex, Mac. & Gord. 741.

The law is the same when the charge is made upon the property by will, and even in the case of debts by simple contract charged upon the estate. *Wastell v. Leslie*, 13 L. J., N. S., 205, Ch.

In the case of a redeemable annuity charged upon an estate, the tenant for life will only be bound to keep down the interest of the estimated value of the annuity. *Bulwer v. Astley*, 1 Phil. 422.

A tenant for life, moreover, will be obliged out of the whole of his income, when increased, to pay off the arrears which accrued due during his own life in consequence of the income having been too small formerly to enable him to keep them down. Thus where the interest of a charge

fell into arrear in consequence of the existence of a jointure prior to the charge, it was held that upon the death of the jointress the tenant for life was bound to pay the arrears which had accrued due out of the increased surplus income. See *Revel v. Watkinson*, 1 Ves. 93, 94. Where Lord Hardwicke observes, that "if tenant for life, upon estates dropping in, should receive the profits from the fines, and let out at a rack rent, without applying the profits to the arrears incurred before, there would be a great arrear upon the remainderman. Nay, if the estate were accidentally improved it ought to be so applied; or if a loss happened by tenants the profits coming in afterwards should be so applied." So where an estate was settled upon A. for life, with remainder as to part to B. for life, with remainder (as to the whole) to C. for life, with power to A. to charge with a sum of money (but not so as to incumber B.'s life estate); A. charged the estate with a sum of money, and died; and then during the life of B. the rents and profits of C.'s part of the estate were insufficient to keep down the interest which fell into arrear upon the death of B.: it was held by Lord Thurlow, C., that C. ought to apply the whole of the rents and profits in payment of the arrears, and that he could not throw them upon the inheritance. *Tracy v. Lady Hereford*, 2 Bro. 128.

Where, however, a mortgagee, having permitted a tenant for life to run in arrear for interest, purchased the life estate, and took possession under the purchase; it was held by Lord Alvanley, M.R., that he was bound to apply the surplus rents and profits beyond the current interest in discharge of the arrears, and that he could not charge any part of them against the inheritance (*Lord Penrhyn v. Hughes*, 5 Ves. 99). In commenting upon this case Sir W. Page Wood, V. C., has well observed that there were two answers to the claim of the mortgagee to throw the arrears upon the inheritance, "one that he came in under a person whose duty it was to keep down the interest, and against whom a bill could have been filed by the reversioner to compel him to keep it down; and the mortgagee claiming under him could not be in a better position, and could not charge upon the reversion the interest which the tenant for life could not so have charged. Another answer might have been, that the mortgagee was trying to turn interest into principal, which the Court of Chancery never allows." Kay, 338.

As a tenant for life is under no obligation or duty to pay the interest on charges beyond the rents, it seems that he will have a charge upon the inheritance for so much of the interest as the rents of the estate were insufficient to pay, and which he has paid from other resources. *Lord Kensington v. Bouverie*, 19 Jur. 577.

Where an estate is given to a person for life, with remainder over, and the rents of the estate up to the death of the tenant for life are insufficient to pay an annuity made chargeable on the estate, it will be a question of intention whether the arrears of the annuity are to be thrown upon the corpus of the estate or not. See *Foster v. Smith*, 1 Phil. 629; *Miller v. Huddleston*, 3 Mac. & Gord. 513; *Playfair v. Cooper*, 1 W. R. 216.

As to Arrears of Interest of previous Tenant for Life.

A tenant for life, however, is not liable, as between himself and the remainderman or reversioner in fee, to pay out of the rents and profits of the estate arrears of interest on a mortgage which accrued due during the life of a preceding tenant for life who died insolvent; but such arrears are primarily a charge upon the inheritance (see *Sharshaw v. Gibbs*, 1 Kay, 333; *Caulfield v. Maguire*, 2 J. & L. 141, 158, censuring the dicta of Lord Alvanley, M. R., in *Penrhyn v. Hughes*, 2 Bro. C. C. 128): the reason being, that, as both the tenant for life and remainderman or reversioner have it equally in their power to compel the previous tenant for life, when in possession, to keep down the interest (*Hayes v. Hayes*, 1 Ch. Cas. 223), it is not just that the consequence of the neglect to do so should be thrown exclusively on the tenant for life.

Where, however, the inheritance of the wife is subject to a mortgage, she and her husband are not bound during her life to keep down the interest for the benefit of her heir; the arrears, therefore, upon her death, would have to be added to the principal, and the husband, as tenant by the curtesy, would be bound during his life to keep down the interest on the aggregate amount, but he is not entitled to an allowance for any interest actually paid during the life of his wife. *Ruscombe v. Hare*, 2 Bligh, N. S., 192.

Where a mortgaged estate is sold, the tenant for life will be entitled to the interest of the surplus. *Tracy v. Lady Hereford*, 2 Bro. C. C. 137.

A tenant for life, however, whether conventional or by operation of law, may redeem the estate, and in that case he has a lien upon it for such part of the charge as the remainderman ought to have contributed; if, however, the tenant for life refuse to redeem, the remainderman may, by redeeming the mortgage, and ejecting the tenant for life, and taking possession of the profits, or by filing a bill of foreclosure, compel him to come in and contribute, or give up the possession of the estate (Coote's Mortg. 527; *Jones v. Griffith*, 2 Coll. 207; and see 3 Anst. 757). And the contribution between the parties, as in the analogous case of contributions for fines upon the renewal of leaseholds, will be in proportion to the respective interests of the parties. *White v. White*, 9 Ves. 554.

As to the apportionment of rents between the representatives of tenant for life and remainderman, see *Clun's Case*, and note, post.

Emblements.

Where persons having limited interests, as, for instance, for a man's own life (Br. "Emblements," pl. 6; 7 H. 4, 17), pour autre vie (Co. Litt. 55 b), as tenant by the curtesy (2 Bl. Comm. 122), or dowress (Statute Merton, 20 Hen. 3, c. 2); or a parson (28 Hen. 8, c. 11); *having sown* their lands with such seeds as produce *annual profits*, their estates determine by act of God, or of another, before harvest, they, or their representatives, will be entitled to emblements, or in other words to the crops of what they have sown, bearing an annual profit, such as corn, hemp, and flax, with liberty to enter

upon the land and carry them away (Co. Litt. 55 a), though not of such things as they may have planted, not bearing an annual profit, such as young fruit-trees, oaks, ashes, elms, nor of the produce of acorns which they may have sown (Co. Litt. 55 b). Hops, it seems, although growing out of the old roots, will go to the executor or administrator of the tenant for life, because it is said "they grow by the manurance and industry of the owner, and so are like emblements" (Vin. Abr. "Emblements," pl. 77; *Latham v. Atwood*, Cro. Car. 515, pl. 13). In *Graves v. Weld*, 5 Barn. & Ad. 105, a tenant, for a term determinable upon a life, sowed the land in spring, first with barley and soon after with clover, the life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover after more than a year had elapsed from the sowing. It was held by the Court of Queen's Bench, that the tenant was not entitled to emblements of either of these two crops: first, because emblements can be claimed only in a crop of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed; and secondly, because even if the plaintiff were entitled to one crop of the vegetable growing at the time of the cesser of his interest, this had been already taken by him at the time of cutting the barley.

Where, however, the estate is determined by the act of the tenant for life, as by surrender (Com. Dig. Biens, G), by forfeiture for breach of a condition or otherwise (Co. Litt. 55 b), or by marriage of a woman who holds *durante viduitate suâ* (*Oland's Case*, 5 Co. 116 a; Co. Litt. 55 b), the tenant for life will not be entitled to emblements. So likewise a parson who resigns his living is not entitled to emblements from the glebe (*Bulwer v. Bulwer*, 2 Barn. & Ald. 470). But it seems if the land of the tenant for life, whose estate was determined by his own act, had been in the occupation of a lessee, that the tenant shall nevertheless have emblements, inasmuch as it would be unjust that he should be prejudiced by the act of his lessor (see *Oland v. Burdwick*, Cro. Eliz. 460; *S. C. nom. Oland v. Bardwick*, Gouldsb. 189; *Bulwer v. Bulwer*, 2 B. & A. 470. Sed vide *Oland's Case*, 5 Co. 116 a). Now, however, by 14 & 15 Vict. c. 25, s. 1, the tenant will be entitled to hold to the end of the current year of the tenancy in lieu of emblements, to which he will be no longer entitled.

A tenant for life will not be entitled to emblements even if the estate be determined by act of God, if the land have been sown by another person. Thus if a woman seised in fee or for life of land, sows it, and afterwards takes a husband, who dies before severance, it seems the wife shall have the crop, and not the executor or administrator of the husband, because

he did not sow the land (Vin. Abr. "Emblements," pl. 17). So if A. seised in fee of land sows it with grain, and afterwards grants it to B. for life, with remainder to C., and B. dies before severance, C. shall have the corn, and not the executors of B., for the reason that industry and charge on the part of B. are wanting. 1b. 21; Hobart's Rep. 178, per Curiam; and see Br. "Emblements," pl. 26.

If emblements be not disposed of either by will or otherwise they will go to the executors or administrators of the tenant for life.

The rule by which emblements are given to the representatives of the tenant for life is, it is said, founded on a consideration of public benefit, for the encouragement of husbandry and the increase and plenty of provisions. Co. Litt. 55 b; 1 Roll. Abr. 726.

Fixtures.

The law upon this subject depends upon grounds analogous to that of emblements, viz. that it is for the public good that a person having a limited interest as tenant for life, who erects a fixture for the better use or enjoyment of land, should not be deprived of it by the claim of the remainderman or reversioner, on the ground of its annexation to the freehold. Formerly it was a general rule of law, that whatever was fixed to the freehold became part of it, and could not be taken from it (Co. Litt. 53 a); this rule, however, has been justly relaxed; for instance, it has been held, that a cider-mill let into the ground by a tenant for life, or tenant in tail (*Anon.*, cited 3 Atk. 15), or fire engines or steam engines erected in a colliery, (*Lawton v. Lawton*, 3 Atk. 13; *Dudley v. Warde*, Amb. 113), belong to his personal representative. Lord Hardwicke in commenting on the latter case observes, "The reason of emblements going to the executor of a particular tenant holds here,—to encourage agriculture; suppose a man of indifferent health, he would not erect an engine at a vast expense unless it should go to his family." See 2 Smith's L. C. 119, note to *Elves v. Marve*; Amos & Fer. on Fix. 123; and *Fisher v. Dixon*, 12 C. & F. 312.

Estovers.

The owners of the inheritance as they may alien or in any way dispose of the whole thereof, so they may fell timber, open mines, pull down houses, being merely a part thereof, and they would not be liable, either in law or equity, for waste. See *Liford's Case*, 11 Co. 50 a; Plowd. 259; *Jervis v. Bruton*, 2 Vern. 251; *Attorney-General v. Duke of Marlborough*, 3 Madd. 498.

Where, however, a person has merely a limited interest in land, as tenant for life, and therefore cannot alien or dispose of the whole thereof, so he cannot in general do anything which would sever or destroy any part of the inheritance, or what forms a parcel thereof, as by felling timber, opening mines, pulling down houses, which is termed waste, and will be examined into somewhat fully hereafter.

To avoid, however, the inconvenience which would result if too severe restrictions were placed upon persons having limited interests, the law allows to every tenant for life, as incident to his estate (unless restrained by special contract), three kinds of estovers,—viz. housebote, or a sufficient quantity of wood for the fuel and repairs of his house; ploughbote, sufficient wood for making and repairing agricultural implements; and haybote, for repairing fences. These estovers, however, must be reasonable (Co. Litt. 41 b).

However, what a person may lawfully take for estovers, he cannot apply for another purpose. Thus, although he may fell timber for repairs, he cannot sell it to pay the wages of the persons employed in making them (Br. "Waste," pl. 112); so if he suffer the timber to lie until it is rotten (Ib.), or fells more than is necessary, even if he alleges that it is wanted for future repairs (*Gorges v. Stanfield*, Cro. Eliz. 593), it is waste. So if he sell timber and employ the money for repairs, or even if he buy the timber again and employ it in repairs, yet "it is waste for the vendition (Com. Dig. "Wast," (D) 5; Co. Litt. 53 b); accordingly it was held in *Simmons v. Norton*, 7 Bing. 640, that in an action of waste for cutting timber, the defendant could not give in evidence, even in mitigation of damages, that the timber was cut for the purpose of necessary repairs, but turning out to be unfit for that purpose, was exchanged for other timber which was applied to the repairs. So a rector may cut down timber for the repairs of the parsonage house or chancel, and is entitled to botes for repairs (*Strachy v. Francis*, 2 Atk. 217); but he cannot sell the timber to defray the expense of ordinary repairs. *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174.

The parson, however, with the consent of the patron and ordinary, may dispose of timber and open mines, and the Court of Chancery would have no difficulty, on a proper application, in directing timber to be cut, and the produce to be applied for the benefit of the living (Ib. 179).

Waste.

With the exception that we have already mentioned in favour of tenant in tail after possibility of issue extinct, tenants for their own life or pour autre vie (unless made unimpeachable of waste), or tenants for life by operation of law, as tenant in dower or tenant by the curtesy, are bound not to commit what is termed waste. *Ap Rice's Case*, 3 Leon. 121; Co. Litt. 53 a.

It may here be mentioned, that at common law waste was only punished in tenants for life by operation of law, viz. tenants in dower and tenants by the curtesy, but not in tenants for life by convention, for the law that created the estate of the former, gave also a remedy against them; but as the latter came in by the lease of the owner of the land, if he did not provide against his lessee doing waste, it was considered right that he should bear the consequence of his own negligence and default. By the Statute of Marle-

bridge, as laid down in the principal case, the lessee for life, and lessee for years, were punishable for waste.

Waste, which is of three kinds,—1st, actual or voluntary; 2ndly, permissive; 3rdly, equitable,—may be defined as the destructive or material alteration of things forming an essential part of the inheritance.

Actual or voluntary Waste.

Actual or voluntary waste is an offence of commission, as in the destruction of houses by pulling them down, or any fixtures thereto, such as wainscots, doors, windows, furnaces or the like (Co. Litt. 53a); cutting down or topping timber trees, so as to make them decay (Ib.); stubbing up underwood, which a tenant for life may lawfully cut down (Ib.); cutting down trees or fences, which although not timber, are a shelter of the house (Ib.); or fruit trees growing in a garden or orchard (Ib.; Com. Dig. "Wast." D 5). And although a tenant for life may cut down as underwood, willows in a plantation or wood, he cannot do so if they were planted by the side of a river to maintain the banks, as he would thereby commit waste. Br. "Waste," pl. 130, 143; *Sir George Stripping's Case*, cited 22 Vin. Abr. 449, pl. 11, note.

Digging pits for gravel, lime, clay, brick, earth, stone or the like, except for repairs, or for mines of metal, coal or the like, hidden in the earth, which were *not open* when the tenant came in is waste (Co. Litt. 53 b; *Viner v. Vaughan*, 2 Beav. 466); but he has a right to continue the working of pits or mines previously opened, though not perhaps where they are old and abandoned, or where mere preparations had been made for opening them. *Clavering v. Clavering*, 2 P. Wms. 389; *Viner v. Vaughan*, 2 Beav. 466.

New pits or shafts may be made in working a mine already open, in order to pursue the same vein. *Clavering v. Clavering*, 2 P. Wms. 388; and *Hellier v. Twiford*, there cited.

The conversion of arable land by the tenant into wood, or *è converso* (Co. Litt. 53 b), or meadow into arable, is waste; for, as Lord Coke observes, "it changeth not only his course of husbandry, but the proof of his evidence" (Ib.). And in an action of waste for ploughing an ancient meadow, the defendant cannot, under the general issue, *nul wast*, give evidence that the ploughing was resorted to according to the custom of the country, for the purpose of ameliorating the meadow (*Simmons v. Norton*, 7 Bing. 640). As between tenant for life and remainderman, it is not waste to plough up pasture land held under lease, if it were not pasture at the date of the lease. *Morris v. Morris*, 1 Hog. 238.

A parson or vicar, however, is not to be considered as merely a tenant for life under a will or settlement; therefore the Court will not, on a bill filed by the patron, restrain him from ploughing up a meadow infested with moss and weeds, for the purpose of laying it down in grass when properly cleaned. *The Duke of St. Albans v. Shipwith*, 8 Beav. 354. See

Hoskins v. Featherstone, 2 Bro. C. C. 552, where the bill was filed against the widow of an incumbent. See also *Huntley v. Russell*, 13 Q. B. 572; *Duke of Marlborough v. St. John*, 5 De Gex & Sm. 174.

Ploughing up a rabbit warren by charter or prescription is waste (Harg. Co. Litt. 53 a, note (8); *Angerstein v. Hunt*, 6 Ves. 488). Secus if it be only lands stored with rabbits and not a legal warren. 22 Vin. Abr. tit. "Waste," 438, pl. 13; *Lurting v. Conn*, 1 Ir. Ch. Rep. 273.

Permissive Waste.

Permissive waste is described by Lord Coke as an act of omission; as not doing repairs, whereby houses are suffered to fall into decay (2 Inst. 145); but it is not waste at common law, either voluntary or permissive, to leave land uncultivated (*Hutton v. Warren*, 1 Mees. & W. 472, per Parke, B.); and it has been said that permissive waste is equally within the Statute of Gloucester (6 Edw. 1, c. 5), as voluntary waste is. Co. Litt. 53 a.

It seems, however, to be doubtful at the present day, whether an action will lie for permissive waste (*Powys v. Blagrove*, 4 De Gex, Mac. & Gord. 448); the decisions, at any rate, seem to show that it cannot be maintained against tenant from year to year (*Gibson v. Wells*, 1 N. R. 290), or for years (*Herne v. Benbow*, 4 Taunt. 764), even if he has covenanted to repair, and leave the premises in as good a condition as they were at a certain period. *Jones v. Hill*, 7 Taunt. 392; 1 B. Moore, 100. See also 1 Wms. Saund. 323 d; 2 Wms. Saund. 252 b.

A Court of Equity will not interfere in cases of permissive waste by tenant for life having the legal estate, nor where it is vested in trustees indirectly through the medium of a trust created in the property. *Powys v. Blagrove*, 1 Kay, 495; 4 De Gex, Mac. & Gord 448. "It was argued," said Lord Cranworth, C., in giving judgment in that case, "independently of the trust that it is the duty of a tenant for life to repair, 'equitas sequitur legem,' but even legal liability now is very doubtful (*Gibson v. Wells*, 1 N. R. 291; *Herne v. Benbow*, 4 Taunt. 764). Whatever be the legal liability, this court has always declined to interfere against mere permissive waste (*Lord Castlemaine v. Lord Craven*, 22 Vin. Abr. 523, tit. "Waste," pl. 11. There the Master of the Rolls said, "the Court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in case of wilful waste." On this ground relief was refused in *Wood v. Gaynon* (Amb. 395). In that case a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, B. Lyme, were reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying, that as there was no precedent, he would not make one; adopting the argument that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwall v. Baylis* (2 Mer. 408), it does not sustain the doctrine for which it was cited. The case of *Re*

Skingley (3 Mac. & G. 221), was founded on the express obligation of the lunatic to keep in repair.

To whom Things severed from the Inheritance by Waste, &c. belong.

By whatever means—by act of God, as by a tempest, or by act of man, as by a trespasser, or by waste of the tenant, things are severed from the inheritance, whether they be the materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance whether in fee or tail in esse (*Uvedall v. Uvedall*, 2 Roll. Abr. 119; *Whitfield v. Bewit*, 2 P. Wms. 240; *Bewick v. Whitfield*, 3 P. Wms. 267), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste. *Pigot v. Bullock*, 1 Ves. jun. 484.

Although a tenant for life be impeachable for waste, if the timber is in such a state, that it is in danger of running to decay, the Court of Chancery, in order to prevent actual waste or destruction from taking place, will, after proper inquiries, order the timber to be cut, and invest the money for the persons entitled to the inheritance, and will allow the tenant for life the interest so long as he lives. *Tooker v. Annesley*, 5 Sim. 235; *Waldo v. Waldo*, 7 Sim. 261; *Tollemache v. Tollemache*, 1 Hare, 456; *Consett v. Bell*, 1 Y. & C. C. C. 569.

Tenant for Life without Impeachment of Waste.

Where, in an instrument making a person tenant for life, a clause is inserted that he is to be "without impeachment of waste," he may, as laid down in the principal case, fell timber, open new mines or pits (Co. Litt. 220 a, and the note 1*), and will have full property in the produce, as will also be the case where timber trees or timber parcel of a house are blown down; his interest, however, does not arise until the severance takes place (*Anon.*, Mos. 237; *Pyne v. Dor*, 1 T. R. 55; *Wolf v. Hill*; *Bridges v. Stephens*, 2 Swanst. 149, n. 150; *Williams v. Williams*, 15 Ves. 425); if, however, the severance of timber take place during the existence of a prior limited interest, the tenant for life without impeachment for waste could not maintain trover, inasmuch as it would vest immediately in the owner of the inheritance. 1 Ves. jun. 484.

If the clause were "without impeachment of any action of waste," no action could be brought against the tenant, but it seems he would not have the property in the thing severed by waste (Co. Litt. 220 a). This clause may be restricted by exceptions, as, "except in houses," "voluntary waste in houses only excepted" (1 Ves. 265), and, as in *Garth v. Cotton* (Dick. 183; 1 L. Cas. Eq. p. 451), "voluntary waste excepted," which would in fact only excuse permissive waste.

The words "without impeachment of waste, farther than wilful waste," were held sufficient to give the tenant for life the interest of money arising from the sale of decaying timber, fallen by the order of the Court of Chancery. *Wickham v. Wickham*, 19 Ves. 419.

So the exemption from liability to waste, annexed to a life estate, may be made subordinate to a discretionary power in trustees to fell timber, and the Court of Chancery will by injunction restrain the tenant for life from cutting timber so as to interfere with the discretionary power of the trustees, provided there was no mala fides, nor any wanton or unreasonable exercise of their discretion. *Kehewich v. Marker*, 3 Mac. & Gord. 311; and see *Briggs v. Earl of Oxford*, 5 De Gex & Sm. 156.

Mode of Procedure in Cases of Waste.

Formerly, one mode of proceeding in case waste was committed, was by an action at common law upon a writ of waste (see *Jefferson v. Bishop of Durham*, 1 Bos. & Pul. 120); but it was in many respects both inconvenient and ineffective, and has been some time since abolished (3 & 4 Will. 4, c. 27, s. 36). Another mode of procedure at law is by an action on the case. 2 Wms. Saund. 252, n. 7.

Many inconveniences, however, being found to attend the procedure at law, resort is now usually had to Courts of Equity; inasmuch as they not only interfere to prevent the threatened commission of waste, or forbid a continuance of it, but have also full power to take accounts and give compensation for past waste. See *Drew. Injunct.* 134.

Waste restrained only in Equity termed Equitable Waste.

Courts of Equity not only interfere to prevent waste at law, but also waste for which there was no remedy at law, and which has hence been termed *equitable waste*.

The first class of cases is where, in consequence of the intervention of a mesne remainder for life, the person having the inheritance in remainder or reversion could not proceed at law against the prior tenant for life; the person having the inheritance, only having power at law to proceed against the *immediate* tenant for life, Courts of Equity granted an injunction to restrain waste. See *Moore*, 554; *Tracy v. Tracy*, 1 Vern. 23; *Farrant v. Lovel*, 723; and see note to *Garth v. Cotton*, 1 L. C. Eq. 497.

Again, although as we have seen where there has been a severance of timber, the person having a vested remainder in the inheritance will be entitled to it, nevertheless where a tenant for life and remainderman in fee, by collusion commit waste, as by felling timber, before a prior contingent remainderman in fee comes into existence, a Court of Equity will, if there be any estate of freehold interposed, whether vested in trustees or any other persons, interpose by injunction. *Garth v. Cotton*, Dick. 183; 3 Atk. 751; 1 Ves. 546; 1 L. Cas. Eq. 451.

The most remarkable interposition of Courts of Equity is in restraining a tenant for life, although "without impeachment of waste," from committing malicious, extravagant and humoursome waste; such as pulling down or dismantling a mansion-house (*Vane v. Lord Barnard*, 2 Vern. 738; Pr. Ch. 454; Gilb. Eq. Rep. 127), or even farmhouses, unless it were intended

to make two into one (*Aston v. Aston*, 1 Ves. 265), grubbing up a wood so as to destroy it absolutely (*Ib.*), felling timber planted or left standing for shelter or ornament of a mansion-house or grounds (*Rolt v. Lord Somerville*, 2 Eq. Ca. Abr. 759; *Packington's Case*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. C. C. 166; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549; *Campbell v. Allgood*, 17 Beav. 623), even if planted by the tenant for life himself. *Coffin v. Coffin*, Jac. 71.

And a tenant for life after possibility of issue extinct, although as we have seen from the nature of his estate unimpeachable of waste, will be restrained from committing wilful and malicious waste. *Attorney-General v. Duke of Marlborough*, 3 Madd. 533; *Abraham v. Bubb*, 2 Show. 69; 2 Freem. 52; 2 Eq. Ca. Abr. 757; 2 Swanst. 172; *Anon.*, 2 Freem. 278; *Cooke v. Whalley*, 1 Eq. Ca. Abr. 400.

It appears that the doctrine relative to the produce of legal waste, viz. that it at once vests in the first owner of the inheritance *in esse*, is not applicable to equitable waste; where, therefore, the assignee of a tenant for life, without impeachment of waste, committed equitable waste, the estate being limited to the issue of the tenant for life, with remainders over in tail, it was held by Sir John Romilly, M. R. (the tenant for life having no issue), that the right to the produce could not be determined until the death of the tenant for life, as he might have issue, who possibly would be entitled to an interest in such produce. *Lushington v. Boldero*, 13 Beav. 418.

See the cases upon the subject of equitable waste collected in the note to *Garth v. Cotton*, L. Cas. Eq. 404.

As to the law of merger as affecting estates for life, see *Forbes v. Moffat*, and note post; and Mr. Bisset's able work on Estates for Life, p. 182.

SIR MILES CORBET'S CASE (a).

Hil. 27 Eliz., in the Exchequer.

[REPORTED 7 Co. 5 a.]

- Resolved 1. Where one has purchased divers parcels of lands in D., together, in which the inhabitants have used to have shack, and long since has inclosed it: and notwithstanding always after harvest the inhabitants have had shack there, by passing into it by bars or gates with their cattle, then it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common; but if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed his own lands from time to time, and so hath held it in severalty, any owner may inclose, and hold in severalty, and exclude himself to have shack with the others.*
- 2. If the commons of the town of A. and of the town of B. are adjoining, and one ought to have common with the other, by reason of vicinage, and in A. there are fifty acres, and in B. one hundred acres of common, the inhabitants of A. cannot put more cattle into their common of fifty acres than it will feed; nec è converso.*

BETWEEN Sir Edward Clere and Miles Corbet (then Esq. and now a Knight), it was resolved in a case concerning the parsonage of Marham, in the county of Norfolk, that where in the county of Norfolk there is a special manor of common, called Shack, which is to be taken in arable land, after harvest, until the land be sowed again, &c. And it began in ancient time in this manner: the fields of arable land in this country consist of the lands of many and divers several persons lying intermixed in many and several small parcels, so that it is not possible that any of them, without trespass to the others, can feed their cattle in their own land, and therefore every one doth put in their cattle to feed promiscuè in the open field. These words "to go to shack," are as much as to say, to go at liberty, or to go at large; in which the

(a) *Clere v. Corbet.*

policy of old times is to be observed, that the severance of fields in such small parcels to so many several persons was to avoid inclosure, and to maintain tillage. But it is to be observed, that the said common called Shack, which in the beginning was but in the nature of a feeding, because of vicinage for avoiding of suit, within some places of that country, is by custom altered into the nature of a common appendant or appurtenant, and in some places it retains its original nature; and the rule to know it, is the custom and usage of every several town or place, for (a) *consuetudo loci est observanda*. And, therefore, if in the town of D. (*exempli gratiâ*) one who hath purchased divers parcels together, in which the inhabitants have used to have shack, and long time since has inclosed it; and notwithstanding always after harvest the inhabitants have had shack there by passing into it by bars or gates with their cattle, there it shall be taken as common appendant or appurtenant, and the owner cannot exclude them of common there, notwithstanding he will not common with them, but hold his own lands so inclosed in severalty; and that is proved by the usage, for notwithstanding the ancient inclosure, the inhabitants have always had common there. But if in the town of S. the custom and usage hath been, that every owner in the same town hath inclosed his own lands from time to time, and so hath held it in severalty, there this usage proves, that it was but in the nature of Shack originally, for the cause of vicinage, and so it continues: and, therefore, there he may inclose and hold in severalty, and exclude himself to have shack with the others. And although in the said case of the town of D. the usage hath been, that notwithstanding the inclosure by divers inhabitants of late times, the other inhabitants have had shack there; yet if a man hath an ancient close of ancient time taken out of the field, and he and all those whose estate he hath have held it always in severalty, he may well keep it inclosed: for as to such parcel so anciently inclosed, the shack there doth retain its ancient and original nature; and he who claims shack there cannot prescribe to have common in it.

Nota, a good resolution, which stands with reason, and no inconvenience, innovation, or cause of suits or trouble can thereupon arise, but quiet and repose will be thereby in many cases established, which I thought fit to be reported, because it is a general case in the said country, and at first the Court was altogether ignorant of the nature of this common called shack.

(a) 4 Co. 28 b; 6 Co. 67 a; 10 Co. 140 a.

It was also resolved at the same time, that if the commons of the town of A. and of the town of B. are adjoining, and that one ought to have common with the other by reason of vicinage; and in the town of A. there are fifty acres of common, and in the town of B. there are a hundred acres of common; in that case the inhabitants of the town of A. cannot put more cattle into their common of fifty acres than it will feed, without any respect to the common within the town of B., *nec è converso* (b); for the original cause of this common for cause of vicinage was not for profit, but for preventing suits in a champaign country: for the reciprocal escapes of the one town into the other; and, therefore, if the common of the town of A. will feed fifty beasts, and of the town of B. a hundred beasts, it is no prejudice to the one or the other, if the cattle of the one town escape and feed in the common of the other town reciprocally; for if all the cattle feed promiscue together through the whole, it will be no prejudice to one or the other.

[Note, the like intercommoning is in Lincolnshire, Yorkshire and other counties, and in Mich. Term, 18 Car. 2, B. R. Twisden, Justice, said, that this common called shack was but common *pur cause de vicinage*.]

(b) 4 Co. 38 b; Co. Litt. 122 a.

TYRRINGHAM'S CASE (a).

Mich. 26 & 27 Eliz., in the King's Bench.

[REPORTED 4 Co. 36 a.]

*T. S., seised of a house, land, meadow and pasture, to which he and all those whose estate he had, agree to have common of pasture for oxen, cows and heifers, levant and couchant, upon the house, land, meadow and pasture, as well in thirty acres in the same town, of which A. was seised in fee, as in forty acres of land whereof B. was seised in fee, to the said house, land, meadow and pasture appertaining. Afterwards B. purchased the said house, land, meadow and pasture, to which all, &c., to him and his heirs, and demised the same to plaintiff, who put his cattle into the said thirty acres to common, and they were driven out by defendant, farmer of A., with a little dog:—Held, 1st. That prescription does not make a thing appendant to another, unless it agree in nature and quality with it, as a thing corporeal cannot be appendant to another corporeal thing, nor vice versâ; but a thing incorporeal may be appendant to a thing corporeal, or *à converso*; though a thing incorporeal cannot be appendant to a thing corporeal which does not agree with it in nature, as a common of turbary cannot be appendant to land, but to a house it may. That common appendant is of common right, and need not be prescribed for; but it only belongs to ancient arable land, and for horses and oxen to plough, and cows and sheep to manure the land; it cannot be appendant to meadow or pasture, and therefore the prescription being for common appendant time out of mind to a house, meadow and pasture, as well as arable land, the common was appurtenant and not appendant. 2ndly. Common appendant, being of common right, is apportionable by the commoners purchasing part of the land to which, &c., as rent is, on the lord's purchasing part of the tenancy, so by his alienation of part of the land to which the common is appendant. But common appurtenant, being against common right, by the said purchase all the common was extinguished. 3rdly.*

(a) *Pheasant v. Salmon*, 13 Co. 66; 2 Brownl. 47; and see 1 Wms. Saund. 23 b, n.

Unity of possession of the whole land is an extinguishment of common appendant. 4thly. Common by vicinage is not common appendant ; but inasmuch as it ought to be by prescription, time out of mind, it is in this respect, resembled to common appendant. And one may inclose against the other, for one cannot put his cattle into the lands of the other but they must escape thither, in which case the trespass is excused by reason of the ancient usage. 5thly. That when the plaintiff's cattle trespass on the defendant's land he might chase them out with a little dog, without being compelled to distrain them. Common appendant remains though a house be afterwards built on the land, or the arable land be converted to pasture ; but in pleading it ought to be prescribed for as appendant to land. So it may be appendant to a manor, carve of land, &c., though it comprehend a house, meadow, &c.

When common appendant is apportionable by purchase of part of the land, the commoner ought to prescribe for the whole, till such a day when he purchased ; when by sale the alienee may prescribe for common appendant to his parcel.

Common being apportioned by purchase of part, if an assise be brought the ter-tenant of the land charged with the residue of the common shall be only charged.

Common appurtenant and in gross may commence either by grant at this day or by prescription.

In case of common by vicinage between adjoining manors, the lord of one manor may inclose against the others, and thereby take away such common.

IN trespass between Phesant plaintiff, and Salmon defendant, the case was such. Thomas Tyrringham was seised of a house, forty-four acres of land, seven acres of meadow, and two acres of pasture, in Titmersh in the county of Northampton ; to which house, land, meadow and pasture, he, and all those whose estate he had, had used to have common of pasture for oxen, cows and heifers, levant and couchant, upon the house, land, meadow and pasture, as well as in thirty acres of land in the same town (whereof one John Pickering was then seised in fee), as in forty acres of land and pasture in Titmersh aforesaid (whereof one Boniface Pickering was then seised in fee), as to the said house, land, meadow and pasture appertaining. And afterwards the said Boniface Pickering, being seised as aforesaid of the said forty acres, purchased to him and his heirs the said house,

forty-four acres of land, seven acres of meadow, and two acres of pasture, to which, &c. And being so seised as well of the said forty acres in which, as of the said tenements to which, &c., demised the house, land, meadow and pasture to which, &c., to Phesant, who put in two cows into the said thirty acres to use the said common; and the said Salmon, who was farmer of the said John Pickering, with a little dog *levitèr et mollitèr* drove out the said cows, and the said Phesant brought his action of trespass for chasing his cattle.

In this case divers points were resolved by Wray, C. J., Sir Thomas Gawdy *et totam Curiam*.

First, that prescription does not make a thing appendant, unless the thing which shall be appendant agrees in quality and nature to the thing to which it shall be appendant; as a thing corporate cannot be appendant to a thing corporate, nor a thing incorporate to a thing incorporate; as it is held in *Hill and Grange's Case*, Plow. Com. 168 a, b. But a thing incorporate, as an advowson, may be to a thing corporate as to a manor, or a thing corporate, as land, to a thing incorporate as an office, as it is there also held; but every thing incorporate cannot be appendant to a thing corporate, as common of turbary cannot be appendant to land but to a house, as it is held in 5 Ass. 9; for the thing which is appendant ought to agree with the nature and quality of the thing to which it is appendant, and turfs are to be spent in a house. So, 10 E. 3, 5, a leet cannot be appendant to a church or chapel, for they are of several natures.

The beginning of common appendant by the ancient law was in such manner. When a lord enfeoffed another of arable land, to hold of him in socage, i. e. *per servitium socæ*, as every such tenure at the beginning (as Littleton saith) (b), was, that the feoffee *ad manutenendum servitium socæ*, should have common in the lord's wastes for his necessary cattle which ploughed and manured his land, and that for two reasons:—1st, Because it was, as it was then held, *tacitè* implied in the feoffment; for the feoffee could not plough and manure his land without cattle, and they could not be kept without pasture, *et per consequens* the feoffee should have (as a thing necessary and incident), common in the lord's wastes and land, and that appears by the ancient books, in temp. E. 1, Common, 24, and 17 E. 2, Common, 23, and 20 E. 3, Admeasurement, 8, and 18 E. 3; and by the rehearsal of the Statute of Merton, cap. 4. The 2nd reason was for the maintenance and advancement of tillage, which is much respected and favoured in law, so that such common

(b) Litt. sect. 119; Co. Litt. 89 b.

appendant is of common right, and commences by operation of law, and in favour of tillage, and therefore it is not necessary to prescribe therein, as it is held in 4 H. 6, and 22 H. 6, as it would be if it was against common right; but it is only appendant to ancient land, arable, hide and gain, and only for cattle, sc. horses and oxen to plough his land, and cows and sheep to manure his land, and all for the bettering and advancement of tillage, and with this resolution agree 37 H. 6, 34 a, b, *per tot. Cur.*, and 26 H. 8, 4 a, as to this latter point, and therefore it is against the nature of a common appendant, to be appendant to meadow or pasture; and, because in the case at bar, the prescription was to have common appendant from time whereof, &c., to a house, meadow and pasture, as well as to arable land, by which it appears to the Court that there had been a house, meadow and pasture, from time whereof, &c., it was therefore resolved, that this common was *appurtenant* and not appendant. But if a man has had common for cattle which serve for his plough appendant to his land, and perhaps of late time a house is built upon part, and some part is employed to pasture and some for meadow; and that for maintenance of tillage, which was the original cause of the common; in this case the common remains appendant, and shall be intended, in respect of the continual usage of the common, for cattle levant and couchant upon such land; at the beginning all was arable, but in pleading he ought to prescribe to have it appendant to land, and, although *terra dicitur à terendo, quia vomere teritur*, yet *terra* includes all, and although now it is pasture or meadow, yet it is arable, i. e. may be ploughed, although it is not now in tillage and ploughed: but if he prescribes to have it appendant to a house, or meadow, or pasture, then it appears of his own showing (as hath been said), that it had been at all times a house, meadow and pasture, and then he cannot have common as appendant to it, but such is common appurtenant. A man may prescribe to have common appendant to his manor, for all the demesnes shall be intended arable, or, at least, shall be in construction of law *reddendo singula singulis* appendant to such demesnes as are ancient arable land, and not to any land newly ploughed and improved to be arable out of his wastes and moors parcel of the manor, and therewith agrees 5 Ass. 2. Also, when a man claims common appendant to his manor, no incongruity as in the case at bar, appears of his own showing. So, common may be claimed to be appendant to a *carve* of land, and yet a carve of land may contain pasture, meadow and wood, as it is held in 6 E. 3, 42; but no incongruity appears

there, and it shall be applied to *that* which agrees with the nature and quality of the common appendant.

2. It was resolved, that common appendant may be apportioned for two reasons :—1. Because it is of common right, and, therefore, if the commoner purchases parcel of the land in which, &c., yet the common shall be apportioned; as if the lord purchases parcel of the tenancy, the rent shall be apportioned. So if A. has common appendant to twenty acres of land, and enfeoffs B. of part of the said twenty acres, to which, &c., this common shall be apportioned, and B. shall have common *pro ratâ*; and where it was objected—1. That the prescription fails in both the cases; for, in the first case, he never had common in part of the land only, but entirely in all, and it would be now a prejudice to the terre-tenant, if he should have common in the thirty acres only, for all the cattle levant and couchant upon all the tenements to which, &c.; and, in the latter case, no common was ever appendant to part of the land, but entirely to the whole; also,—2. In assise of common, all the terre-tenants ought to be named, and that cannot be when the commoner himself has purchased part of the land. As to these objections it was answered and resolved, that, as to the first, the prescription ought to be special, sc. to prescribe to have common in the whole till such a day, and then to show the purchase of part, and from that time that he has put in his cattle into the residue *pro ratâ portione*, as in the cases when a corporation has liberties by prescription, and within time of memory the corporation is altered, there ought to be a special prescription; as to the second case, sc. when part of the land to which, &c. is aliened, there every of them may prescribe to have common for cattle levant or couchant upon his land, and in none of these cases any prejudice accrues to the tenant of the land in which the common is to be had; for he shall not be charged with more upon the matter than he was before the severance; and God forbid the law should not be so, when part of the land to which, &c., is aliened; for otherwise, many commons in England (which God forbid), would be annihilated and lost; and it was agreed, that such common which is admeasurable, shall remain after the severance of part of the land to which, &c. But in the case at bar, forasmuch as the Court resolved that common was appurtenant and not appendant, and so against common right, it was adjudged, that, by the said purchase, all the common was extinct; for in such case, common appurtenant cannot be extinct in part, and be *in esse* for part by the act of the parties. And

as to the last objection, it was answered and resolved, that, if upon the matter the common appendant should be apportioned, then the tenant should be only named out of the land charged with the residue of the common, as in the case where a rentcharge is apportioned in case of descent, the tenant of the land shall be only named out of which the residue of the rent which remains issues. And it was said in this case, this word *pertinens* is Latin as well for appurtenant as for appendant, and therefore *subjecta materia*, and the circumstance of the case ought to direct the Court to judge the common to be appendant or appurtenant. 3. It was resolved, that unity of possession of the whole land to which, &c., and of the whole land in which, &c., makes extinguishment of common appendant against the opinions, 11 E. 3, Common, 11; 14 Ass. 21; 15 Ass. 2; 20 E. 3, Admeasurement, 8. The reason of which opinions was, because the land to which the common was claimed was ancient land, hide and gain, and for maintenance and advancement of tillage, but inasmuch as it was against a rule in law, sc. when a man has as high and perdurable estate as well in the land as in the rent, common and other profit issuing out of the same land, there the rent, common and profit is extinct, and therewith agrees 24 E. 3, 25. 4. In this case Wray, C. J., said, that common for cause of vicinage is not common appendant, but inasmuch as it ought to be by prescription, from time whereof, &c., as common appendant ought, it is in this respect resembled to common appendant; but common appurtenant and in gross may commence either at this day by grant or be by prescription. And Wray, C. J., further said, that in case of common of vicinage the one may enclose against the other, for he who has such common cannot put his cattle into the land of the other, but he ought to put them in the land where he has common, and if they stray into the other land they are excused of trespass, by reason of the ancient usage which the law allows to avoid suits which would arise if actions should be brought for every such trespass, when no separation or enclosure is between the commons; and therefore he said, that one may enclose against the other, for cessante causâ cessat effectus. 5. It was resolved without any difficulty, that when the plaintiff's cattle came into the defendant's land, and did him trespass, the defendant with a little dog might chase them out, and should not be compelled to restrain them for damage feasant. Nota, reader, according to the said opinion of Wray, C. J., it was now lately adjudged in the King's Bench, between Smith plaintiff, and How and Redman defendants,

where the case was that two lords of two several manors had two wastes adjoining, (parcels of their manors joining,) without inclosure or separation, and yet the bounds of each manor were well known by certain bounds and marks, in which wastes the tenants of the one manor and of the other had reciprocally common for cause of vicinage : in that case one may inclose against the other, and thereby utterly toll the common for cause of vicinage : against which two objections were made ;—1. Because it had been used by prescription from time whereof, &c., the beginning of which cannot be known, it would be hard now to break *that* which has had such continuance ; for as it is said, “ obtemperandum est consuetudini rationabili tanquam legi.” 2. Perhaps the waste of one was greater or of greater value than the other, and probably those who had the less at the beginning gave recompense to have his common in the greater, and therefore it would be now unreasonable to undo or defeat it. As to these it was answered and resolved, that the prescription imports the reciprocal cause in itself, *sc.* for cause of vicinage, and no other cause can be imagined ; and forasmuch as it is potius an excuse of trespass, when the cattle of the tenants of the one manor stray into the waste of the other manor, than any certain inheritance ; for it was resolved clearly, that the tenants of the one manor could not put their beasts into the wastes of the other manor, but they should come there only by escape, and that the inclosure is only to prevent the escape of the cattle (which is a lawful act), for these reasons it was adjudged that the one might inclose against the other.

Nota, reader, it is true that agriculture and tillage is greatly respected and favoured as well by the common law as by the common assent of the king, lords spiritual and temporal, and all the commons in many parliaments. 1. The common law prefers arable land before all other, and therefore for its dignity it ought to be named in a præcipe before meadow, pasture, wood or any other soil ; and it appears by the statute of 4 H. 7, c. 19, that six inconveniences are introduced by subversion or conversion of arable land into pasture, tending to two deplorable consequences. The first inconvenience is the increase of idleness—the root and cause of all mischiefs. 2. Depopulation and decrease of populous towns, and maintenance only of two or three herdsmen, who keep beasts in lieu of great numbers of strong and able men. 3. Churches for want of inhabitants run to ruin and are destroyed. 4. The service of God neglected. 5. Injury and wrong done to patrons

and curates. 6. The defence of the land for want of men strong and enured to labour against foreign enemies weakened and impaired. The two consequences are:—1. These inconveniences tend to the great displeasure of God. 2. To the subversion of the policy and good government of the land, and all this by decay of agriculture, which is there said to be one of the greatest commodities of this realm, which one act of parliament as to this purpose may, as a figure in arithmetic, in the third place, stand for a hundred: but I have observed that the most excellent policy, and assured means to increase and advance agriculture, is to provide that corn shall be of reasonable and competent value; for make what statutes you please, if the ploughman has not a competent profit for his excessive labour and great charge, he will not employ his labour and charge without a reasonable gain to support himself and his poor family.

Tyrringham's Case is a leading authority upon the law relating to commons and rights of common, the various kinds of which, their origin and incidents, are therein described by Lord Coke with his usual perspicuity and learning.

A right of common may be defined as a right which one person has of taking some part of the produce of land, while the whole property of the land itself is vested in another. Burt. Comp. 353; Bract. c. 38, fol. 222.

There are four kinds of commons:—I. Common of pasture, or the right of feeding beasts upon the land of another; II. Common of piscary, or the right of fishing in the waters of another; III. Common of estovers, or the right of cutting wood on the land of another; IV. Common of turbary, or the right of digging turves on the soil of another. To which perhaps may be added the similar right of getting sand, clay, stone, and even coals and other minerals on another's land (Co. Litt. 122 a). These it is proposed to examine seriatim.

V. We will next consider how the right of common may be acquired; VI. The incidents to rights of common, and herein of the respective rights of the lord and commoners; VII. The alienation of rights of common; VIII. The extinguishment of rights of common.

I. *As to Common of Pasture.*

Common of pasture is of four kinds:—1. Appendant; 2. Appurtenant; 3. By reason of vicinage; 4. In gross.

1. *Common of Pasture Appendant.*

Common of pasture appendant, as is laid down in *Tyrringham's Case*,

had its origin from the favour shown by the common law to tillage; for when the lord of a manor enfeoffed another of *arable land to hold of him in socage*, it was at a very early period held to be tacitly implied, by mere operation of law, that the tenant should have, *of common right*, liberty to depasture in the lord's wastes such cattle as were necessary or useful in agriculture, such as "horses and oxen to plough, and cows and sheep to manure his land;" but for no other animals, such as hogs, goats or geese, as in the case in commons appurtenant (37 Hen. 6, 34; F. N. B. 180; Co. Litt. 122 a; *Tyrringham's Case*, ante, p. 76). Hence a plea claiming common appendant *for all kinds of beasts* cannot be supported. 37 Hen. 6, 34; 25 Ass. pl. 8; *Standred v. Shorditch*, Cro. Jac. 580.

As all manorial tenures must have been created before the Statute of Quia Emptores, 18 Edw. 1, it is clear that common appendant cannot be created at the present day (1 Roll. Abr. 396, C. 2; 26 Hen. 8, 4, 15). It can be claimed therefore only by prescription; but, as under a claim of a common appendant a title by prescription is implied, a person claiming to be entitled to a common appendant has no occasion to plead prescription, but merely that the common is appendant. Co. Litt. 121 b, 122 a, note 177, by Harg.; *Hayes v. Bridges*, Ridg. L. & S. 410.

This kind of common is in general only appendant to *arable* land, and not to a house, meadow or pasture (1 Roll. Abr. 397, E. 28, 29; *Scholes v. Hargreaves*, 5 T. R. 46). Where originally all the land was arable, the mere fact of a house having been built upon part of the land, or part of it having been converted into meadow or pasture, will not, where there has been a continual usage of common for cattle, levant and couchant, upon such land, destroy the original right (*Tyrringham's Case*, ante, p. 76). The right of common, however, should be properly pleaded as appendant to the *land*; for if, as in *Tyrringham's Case*, the owner of the land prescribes to have it as appendant to a *house*, meadow or pasture, as it appears by his own showing that the nature of the property is such as, according to the rules before laid down, common cannot be appendant thereto, it will be held that such common is *appurtenant*.

In some cases common of pasture has been held appendant to a cottage; it was because at one time by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), a cottage must have had four acres of land attached to it (*Emerton v. Selby*, 2 Ld. Raym. 1015; and see 5 T. R. 49). So likewise common may be appendant to a messuage, where, in addition to a house, land is considered as included in that term (see 5 T. R. 49; *Benson v. Chester*, 8 T. R. 396). So likewise it may be claimed as appendant to a manor, farm, plough-land, or a carve of land, though it may contain pasture, meadow and wood; for it shall be presumed to have been all originally arable land, though afterwards converted into meadow, pasture or wood (2 Bac. Abr. 94); but a right of common appendant cannot be claimed in respect of land newly ploughed, and converted into arable land, out of the wastes and moors parcel of the manor. 5 Ass. 2; Roll. Abr. 397; 2 Bac. Abr. 94.

As a general rule, a person having a right to common appendant can only claim it for such cattle as are levant and couchant on his estate; that is, for such and so many as he has occasion for to plough and manure his land in proportion to the quantity thereof (*Bennett v. Reeve*, Willes, 227, 231); or perhaps, more accurately speaking, such cattle as the land will keep during the winter (*Benson v. Chester*, 8 T. R. 396; *Cheesman v. Hardham*, 1 B. & Ald. 711); but he cannot claim it for cattle which are merely borrowed unless he make use of them all the year to plough or manure his land (Willes, 231; *Manneton v. Trevilian*, 2 Show. 328; Skin. 137; *Rumsey v. Rawson*, 1 Vent. 18, 25; T. Raym. 171); nor can he rent his right (22 Ass. pl. 84, and 11 H. 6, 22). The right, however, may by usage be limited to a certain number of cattle. 17 E. 3, 27, 34; Roll. Abr. 398 b.

There are indeed some cases in the old books which speak of common *sans nombre*, and which seem to imply that levancy and couchancy is only necessary in the case of common appurtenant, and not in the case of common appendant. But the notion of common *sans nombre*, in the latitude in which it was formerly understood, has been long since exploded, and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put in a particular number of cattle. Per Willes, C. J., in *Bennett v. Reeve*, Willes, 232.

A man, therefore, having a right of common appendant for no more cattle than are levant and couchant on his land, no absurdity will follow let the land be divided ever so often into ever such small parcels, the owner of each parcel will be entitled pro rata to have an apportionment of the common. Ib. 231.

The right to common appendant may be limited to a certain period, as for all the year, saving a certain time, in which the lord uses the land (27 E. 3, 86 b; Roll. Abr. 396), or from the time when the hay is carried off a meadow until Candlemas (17 E. 3, 26, 34; Roll. Abr. 397), or (according to an obsolete system of agriculture) for two years after the corn cut and carried away from a cornfield until it is resown, and every third year per totum annum. 22 Ass. 42; Roll. Abr. 397.

2. *Common of Pasture Appurtenant.*

Common of pasture appurtenant does not, like common appendant, owe its origin to common right or to a general privilege supposed to have been conferred by lords of manors upon tenants to whom they granted arable land; but it may commence at the present day and may be claimed from the grant of the owner of the land, or by prescription, which supposes a now forgotten grant (Burt. Compend. 354; *Sacheverill v. Porter*, Cro. Car. 482; *Conlam v. Slack*, 15 East, 108; *Hayes v. Bridges*, Ridg. L. & S. 410). Common appurtenant does not confine the right of depasturing on the land of another to such beasts only as are usually termed commonable, as horses, oxen, cows and sheep, for it may extend to beasts not commonable, as swine, goats and geese (Co. Litt. 122 a). And this right is not

necessarily appurtenant to arable land, but may be claimed in respect of any kind of land (*Sacheverill v. Porter*, Cro. Car. 482), and may be exercised over a different lordship from that in which the waste is situated. Ib.

Where the commoner claims a general right, without any restriction as to number, to pasture cattle on the soil of another, the claim will be bad and cannot exist at law; for otherwise, to use the words of Lord Kenyon, a person "might collect as many cattle as he could from all parts of the kingdom, and stock them on one common" (*Benson v. Chester*, 8 T. R. 396, 401). The usual mode adopted, when a person makes such a claim, of admeasuring the common, that is to say, of ascertaining the number of cattle he may put thereon, is by showing the number of the cattle levant and couchant, on the land to which the right is appurtenant, during the winter. Noy, 30.

Hence levancy and couchancy must be proved by showing that the party claiming the right is in possession of some land whereon the cattle might be levant and couchant. *Scholes v. Hargeaves*, 5 T. R. 48; *Benson v. Chester*, 8 T. R. 396; *Ivatt v. Mann*, 4 Scott, N. R. 342.

A person may claim common appurtenant for a certain number of cattle, and in that case may put in those belonging to a stranger (2 Bac. Abr. 96), because no prejudice can arise to the owner of the soil, as the number is ascertained (*Richards v. Squibb*, 1 Ld. Raym. 726). The commoner need not, therefore, in such case aver that the cattle were levant and couchant. *Stevens v. Austin*, 2 Mod. 185; *Day v. Spooner*, Roll. Abr. 401, pl. 4; *Thornel v. Lassels*, Cro. Jac. 27.

3. Common of Pasture in Gross.

Common in gross is so called, because it does not appertain to land, and must arise either from grant or by prescription. Co. Litt. 122 a.

Common in gross can only be claimed by persons who can take by grant; a claim, therefore, by the *inhabitants* of a place for all manner of beasts without alleging levancy and couchancy is bad (15 E. 4, 32(B), 33); but a corporation sole, as the parson of a church, or a lay corporation, may prescribe for a common in gross (*Mellor v. Spateman*, 1 Saund. 343); but not, it seems, the king or lord of the manor. 27 H. 8, 10 B. Davys, Rep. 2.

Common in gross may be either for a certain number of cattle (Co. Litt. 122 a), or *sans nombre*; but by the latter term is meant not that the party claiming the right is entirely unrestricted as to number, as he can only claim to turn on the common so many cattle as it will maintain beyond the cattle levant and couchant on the lands of the lord and the commoners. The cases, however, upon the subject are contradictory. See 11 H. 6, 22 B; Co. Litt. 122 a; *Saye's Case*, March, 83; *Mellor v. Spateman*, Saund. 343; 22 Ass. pl. 36; 12 H. 8, 2; *Stables v. Mellor*, 2 Show. 43; 2 Lev. 246; Sir Thomas Jones, 115; *Stamford v. Bruges*, Shep. Abr. 381.

As to commons in royal forests, which may be either appendant, appurtenant or in gross, see *Woolwrych on Commons*, 105.

4. *Common pur Cause de Vicinage.*

This kind of common arises by prescription, where two commons adjoin each other, and the persons having a right of pasturage only over one of the commons allow their cattle indiscriminately to range over both. *Co. Litt.* 122 a.

This kind of common is not properly a right of common or profit à prendre, but is rather an excuse for a trespass (*Co. Litt.* 122 a; *Wells v. Percy*, 1 Bing. N. C. 566, 567; *Smith v. Baynard*, 3 Keb. 388); it will not justify a man putting his cattle originally in the common of vicinage, but they must escape from his own. *Bromfeild v. Kirber*, 11 Mod. 72.

It seems that it is not essential to support a claim to a common pur cause de vicinage, that it should be between persons having rights of common properly so called, or at least that there should be commoners on both sides; but that it may exist between two proprietors whose lands are not subject to common rights (*Jones v. Robin*, 10 Q. B. 620, 632, 635, and cases there cited); for, as observed by Parke, B., "the reason of the law which sanctions a claim of this sort is either on account of its convenience, it being better to intercommon than that each should watch his own cattle (7 Ed. 4, 26, fol. A, pl. 3), or, as stated in *Tyrringham's Case*, to avoid multiplicity of suits; and both these reasons apply to owners who interpasture as well as to commoners, though as to the latter not to the same degree; and the argument that the right can exist amongst commoners only, because they only are limited in turning in cattle on the undivided waste or land, is of no weight, because the alleged usage restricts the right of intercommoning to cattle *duly* turned on in order to pasture on the land of one proprietor, and, therefore, limits the number to such as could reasonably be fed on the land in respect of which the right is claimed." 10 Q. B. 633.

A claim, however, of common pur cause de vicinage between two proprietors must be claimed by a plea of a grant or prescription and not of a custom. *Jones v. Robin*, 10 Q. B. 581, 620; *Clarke v. Tinker*, 10 Q. B. 604.

To establish a common pur cause de vicinage, an intercommoning between two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly driven back by their respective owners, or turned off by the owners of the land into which they had strayed. *Clarke v. Tinker*, 10 Q. B. 604.

And common pur cause de vicinage cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. *Heath v. Elliott*, 4 Bing., N. S., 388.

Although it is laid down in *Tyrringham's Case*, that common, by reason of vicinage, ought to be claimed as an immemorial right, it is clear that since the statute 2 & 3 W. 4, c. 71, the right may be proved by showing thirty years' user, *Prichard v. Powell*, 10 Q. B. 589, 603. "It is said," observed Lord Denman, C. J., "that great inconvenience may follow; that the lord of one manor may make many grants, and purposely overstock his own common in order to eat up the grass of the adjoining one by cattle that will stray. If that were really done, it might probably be held fraudulent; or, at all events, there is a remedy by inclosure." *Ib.* 603.

The owner of the soil of each of the commons may at any time, by making a sufficient fence between them, put an end to this right of common for cause of vicinage; until, however, this be done, where a person puts his cattle upon his own common, and they stray into the other land, to use the words in *Tyrringham's Case*, "they are excused of the trespass, by reason of the ancient usage which the law allows to avoid suits which would otherwise arise, if actions should be brought for every such trespass, when no separation or inclosure is between the commons," ante, p. 78. *Co. Litt.* 122 a; *Sir John Conway's Case*, *Dyer*, 316; *Wells v. Percy*, 1 Bing. N. C. 556; *Jones v. Robin*, 10 Q. B., 581, 620; *Prichard v. Powell*, *Ib.* 589.

And the common will continue unless the separation be complete; thus where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage for the highway which led over the one to the other; yet as the separation was not complete, so as to prevent the cattle from straying from the one to the other by means of the highway, the common by vicinage still continued. *Gullett v. Lopes*, 13 East, 848.

There is another species of common in some counties, especially in Norfolk, which goes sometimes by the name of shack, where fields of arable land consist of the lands of many persons intermixed in many parcels, so that it is not possible that any of them can, without trespass to the others, feed their cattle in their own land, and, therefore, after the harvest, every one puts in his cattle to feed promiscuously in the open field. This species of common is very fully described in *Sir Miles Corbet's Case*, the leading authority upon the subject.

Where a common pur cause de vicinage, or common of shack, is claimed, the number of cattle must be limited in the first case to the number which the common, in the second to the number which the land, of the persons making the claim will maintain. *Termes de la Ley*, 80; *Prichard v. Powell*, 10 Q. B. 603; and see *Cheesman v. Hardham*, 1 B. & Ald. 711, where it is observed by Bayley, J., with reference to common of shack, that the number of cattle which each man is at liberty to turn out must be limited by some rule. This introduces levancy and couchancy, by which the number of cattle to be turned out is restrained to that which the land of each individual is capable of supporting.

II. *Common of Piscary.*

Common of piscary is the right of fishing in waters on the soil of another person (8 Taunt. 187); it may be either appendant, appurtenant, or in gross (34 Ass. pl. 11). If a person claim to have a common of piscary or a free fishery, he cannot exclude the owner of the soil (Co. Litt. 122 a); but if he claim to have a several fishery *separalem piscariam*, the owner of the soil shall not fish there (Ib. 122 a). As to the distinction between common of fishery, free fishery, and several fishery, see Co. Litt. 122 a, Butler's note 181; 1 Chitt. Game Laws, 239; *Hayes v. Bridges*, Ridg. L. & S. 390.

III. *Common of Estovers or Estouviers.*

Common of estovers is the right of cutting wood from the forests or wastes of another (Bracton, 231), and herein it differs from estovers which a termor or tenant for life is entitled to, inasmuch as he takes them from the soil in which he himself has a limited interest. See ante, p. 66.

Under the term estovers is comprehended housebote, or wood for the purpose of repairs and fuel, ploughbote and cartbote or wood for the repair of agricultural implements, and haybote or wood for repairing fences. 1 Bulst. 94.

This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits in alieno solo is bad. *Gateward's Case*, 6 Rep. 59; *Bean v. Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead v. Marlome*, 4 T. R. 717; *Selby v. Robinson*, 2 T. R. 758; *Hoskins v. Robins*, 1 Vent. 123, 163; 2 Saund. 320.

Estovers can only be taken according to the prescription or grant, whether it be at a fixed time (10 E. 4, 2, B; Brit. 153; *Russel and Broker's Case*, 2 Leon. 209; 3 Leon. 218) or by the view and delivery of the lord or the lord and bailiff (8 E. 3, 54); otherwise, although the party taking them may take less than he be entitled to, he may be treated as a trespasser.

Common of estovers may be either appendant, appurtenant or in gross. Where it is claimed as appendant or appurtenant, it must be pleaded as belonging to some tenement. 11 H. 6, 11, B; 7 E. 4, 27; 10 E. 4, 3; 12 E. 4, 8.

It can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86); but if it be pulled down, and another rebuilt instead, either in the same or another place, the prescription will not be lost. *Costard and Wingfield's Case*, Godb. 97; *Comper v. Andrews*, Hob. 40.

A fortiori, mere alterations in a house will not destroy the prescription, but no greater profits must be taken ab alieno solo than the grant or prescription warrants. Thus, it is laid down that, "if a man has estovers either by grant or prescription to his house, although he alter the rooms and chambers of this house, as to make a parlour where it was the hall, or the

hall where the parlour was, and the like alterations of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions will be destroyed, and although he build new chimneys, or make a new addition to his house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added." *Luttrell's Case*, 4 Co. Rep. 87 a.

The estovers taken must be *reasonable*, and limited to the wants of the tenement in respect of which a man claims them, upon which, therefore, they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54), and cannot be sold to be used elsewhere (11 H. 6, 11 b, *Earl of Pembroke's Case*; Clayt. 47). Where, therefore, a person has common of estovers appurtenant to a house, and he grants to another the estovers reserving the house to himself, or grants the house to another reserving the estovers to himself; in either of those cases, the estovers shall not be severed from the house, because they must be spent in the house (Plowd. 381; 3 Cruise, Dig. 30, 70). But it seems that where the quantity of estovers is certain, not only would a right to take them in gross by prescription be good, but if it were appurtenant to a tenement it might be severed from it. Co. Litt. 121 b.

It may here be mentioned, that in the case of *Arundel v. Steere*, Cro. Jac. 25, where a person prescribed to have estovers for repairing houses, or for building new houses in the land, it was alleged that the custom was unreasonable, to take estovers for the building of new houses, but all the Court, except Williams, held it to be a good prescription, for one might grant such estovers at that day. Williams held the prescription bad upon the ground that such a claim ought only to be made for the repair of ancient houses. See also *White v. Coleman*, Freem. Smirke's Ed. 143.

IV. *Common of Turbary.*

This kind of common is the right of digging turves upon the soil of another person. It may be either appendant or appurtenant to a house; but, as is laid down in *Tyrringham's Case*, it cannot be appendant to land, for turves would be only wanted in a house (5 Ass. 9; see also *Valentine v. Penny*, Noy, 145); and the right will pass under a grant of a house and its appurtenances. *Solme v. Bullock*, 3 Lev. 165.

Like, however, all other cases of a claim of right in alieno solo, in order to be valid, the right of common of turbary must be made with some limitation and restriction. It may be claimed as appendant to an ancient house within a manor, and by prescription or grant as appurtenant to any house out of a manor.

Thus where a custom was pleaded that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, had immemorially by themselves, their tenants and occupiers, dug, taken

and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the *improvement* thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, at *all* times of the year, as often and in such quantity as occasion hath required: it was held by the Court of King's Bench, that the plea was bad in law, as being indefinite and uncertain, and destructive of the common: and so, it was held, was a plea of a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements. *Lady Wilson v. Willes*, 7 East, 121. So in *Valentine v. Penny*, Noy, 145, where trespass was brought for breaking a close and digging the soil; and the defendant justified that he and all whose estate he had in a cottage had common of turbary to dig and *sell ad libitum* as belonging to the house: the plea was held bad, as showing a right of common which was an interest and a freehold, and which as a prescription was repugnant in itself, because "a common appertaining to a house ought to be spent in the house, and not sold abroad." See also *Hayward v. Cannington*, 1 Lev. 232; *S. C.* Siderf. 354, nom. *Heyward v. Cannington*. As to a claim to take clay, see *Clayton v. Corby*, 2 Q. B. 813; 5 Q. B. 415.

It seems that inhabitants cannot prescribe as such for common of turbary (2 Atk. 189; *Freem. by Smirke*, 136), but the mayor and burgesses of a borough may prescribe for common of turbary for themselves and the inhabitants, and by this means the inhabitants may get the benefit of the prescription (*White v. Coleman*, *Freem. by Smirke*, 134); and it seems a freeman of a town may have the right of common of turbary. *The King v. Warkworth*, 1 Mau. & Sel. 473.

With regard to the last three kinds of common it has been well observed by Serjeant Stephen that they "had all reference, no doubt, to the same object as common of pasture, viz. the maintenance and carrying on of husbandry; common of piscary being given for the sustenance of the tenant's family; common of turbary for his fuel; and estovers for repairing his house, his instruments of tillage, and the necessary fences of his grounds." 1 Steph. Com. 630.

V. *How Rights of Common may be acquired.*

In considering the different species of rights of common we have shown, to a considerable extent, how they may be acquired or evidenced, viz. either by grant, prescription or custom. With respect to rights of common acquired by grant it will be unnecessary to say anything further: with respect to rights of common claimed either by prescription or custom, as the terms, although in early periods indiscriminately used, are by no means synonymous and lead to different results, it will be necessary to distinguish between them.

"In the common law," says Lord Coke, "prescription, which is *personal*,

is for the most part applied to persons, being made in the name of a certain person, and of his ancestors, or of those whose estate he hath; or in bodies politic or corporate, and their predecessors; but a custom which is *local* is alleged in no person, but laid within some manor or other place." See also 6 Rep. 60; 8 Rep. 64 a.

Although a prescription to take a profit (*profit à prendre*) in alieno solo as contradistinguished from a mere easement may be valid, a custom to that effect, except in the case of copyholders, is clearly bad (see *Gateward's Case*, 6 Co. 50 b), and a custom will not be valid unless it be reasonable.

Before the passing of the Prescription Act (2 & 3 Will. 4, c. 71) the right to commons by prescription, like that of easements, could be defeated by showing that enjoyment commenced since the commencement of the reign of Richard the First. See post, p. 114. By the Prescription Act (2 & 3 Will. 4, c. 71), after reciting that the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice: it is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land, except such matters and things as are therein specially provided for, and, except tithes, rent, and services, shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit or benefit was first taken or enjoyed at any time prior to such period of *thirty* years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. Sect. 1. See post, pp. 114, 115.

VI. *The Incidents to Rights of Common, and herein of the respective Rights of the Lord and Commoners.*

As the lord is the owner of the soil of the common, subject to the rights of the commoners, he may, as a general rule, exercise all acts of ownership over the soil, which do not injure their rights, such as planting trees or making fishponds, breeding game, digging clay for bricks, getting coal or other minerals, provided he does as little damage as possible. *Kirby v. Sadgrove*, 1 Bos. & Pul. 13; *Hassard v. Cantrell*, 1 Latw. 107; *Coo v. Cauthorn*, 1 Keb. 390; 5 Vin. Abr. 7, 39, per Windham, J., in notis.

The lord has likewise a right of common upon his own land ; for, as observes Lord Coke, "If a man claim by prescription any manner of common in another's land, and that the owner of the land shall be excluded to have pasture, estovers or the like, this is a prescription or custom against the law, to exclude the owner of the soil, for it is against the nature of this word *common*, and it was implied in the first grant, that the owner of the soil should take his reasonable profit there, as it hath been adjudged" (Co. Litt. 122 a). But "a man may prescribe or allege a custom to have and enjoy, *solam vesturam terræ*, from such a day till such a day, and thereby the owner of the soil will be excluded from pasturing or feeding there ; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there." Co. Litt. 122 a.

It was indeed doubted in *North v. Cox*, 1 Lev. 253, whether a party could prescribe to take the sole and several herbage, but it was afterwards established as law by the cases of *Hoskins v. Robbins*, Pollexf. 13 ; *Potter v. North*, 1 Vent. 385 ; 1 Saund. 350 ; see also *Welcome v. Upton*, 6 Mees. & W. 536. However, a separate right of feeding and folding, claimed on account of a manor farm, is not a claim of common, properly so called, but something reserved out of the original grant. 4 Scott, N. R. 356, per Tindal, C. J.

By the Statute of Merton (20 Hen. 3, c. 4, extended by 2nd Westminster, 13 Ed. 1, st. 1, c. 46, and 3 & 4 Ed. 6, c. 3), which seems to have confirmed the common law (2 Inst. 85 ; 3 T. R. 447), the lord of the manor, and it seems any owner of the soil, although not properly speaking the lord of the manor (*Glover v. Lane*, 3 T. R. 445 ; *Patrick v. Stubbs*, 9 Mees. & W. 830), may approve or inclose part of the common as against the commoners, provided that he leave sufficient pasture for them, with free egress and regress from their tenements into the pasture (20 Hen. 3, c. 4), even if afterwards it becomes insufficient (2 Inst. 87) ; but the onus of proving that a sufficiency was left lies with the lord. *Arlett v. Ellis*, 7 B. & C. 463 ; *Lake v. Plaxton*, 10 Exch. 196.

A custom for the lord to inclose (*Arlett v. Ellis*, 7 B. & C. 346), or to grant leases of the waste (*Badger v. Ford*, 3 B. & Ald. 153), without limit or restriction, is bad.

The Statute of Merton does not give the lord power to approve any kind of common, except common of pasture ; it seems, therefore, that in the absence of a custom which would be valid (*Arlett v. Ellis*, 7 B. & C. 346, 370, 371), the lord cannot approve against common of turbary, because it has been said that common of turbary being necessarily by grant, the lord can do nothing in derogation thereof. *Grant v. Gunner*, 1 Taunt. 435 ; and see *Duberley v. Page*, 2 T. R. 391, where the tenants had a right to dig gravel.

The lord of the manor or his grantee may inclose or approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as common of turbary, common

of estovers, common of piscary, or a right to dig sand, provided he leaves sufficient common of pasture (*Fawcett v. Strickland*, Willes, 57; Com. Rep. 578; *Shakespear v. Peppin*, 6 T. R. 741); but if the approvement interfere with those other rights, the commoners may bring their action against the lord. 6 T. R. 748.

Where the lord of the manor makes a hedge round the common, or does any act, that entirely excludes the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common (per Lord Kenyon, C. J., in *Sadgrove v. Kirby*, 6 T. R. 485). Hence it has been held, that under such circumstances the commoner may break down the whole of a fence put up by the lord (*Arlett v. Ellis*, 7 B. & C. 346); but if the commoner can get at the common and enjoy it to a certain extent, and his right be merely abridged by the act of the lord, in that case his remedy is by action against the lord, and he cannot assert his right by any act of his own (per Lord Kenyon, C. J., 6 T. R. 486). Thus it has been held, where a lord had planted trees and turned out rabbits on the waste,—legal rights which as owner of the soil he might clearly exercise, provided he left a sufficiency of common for the commoners,—the commoner in such case cannot take upon himself to decide that the trees or rabbits on the common are a nuisance, and to cut down the trees or destroy the rabbits; but he is bound in the first instance to bring his action, and to establish to the satisfaction of a jury that they are a nuisance (per Bayley, J., 7 B. & C. 363; and see *Sadgrove v. Kirby*, 6 T. R. 483; *Cooper v. Marshall*, 1 Burr. 259). The Court of Chancery will assist and protect the lord in making an approvement under the Statute of Merton. *Weeks v. Stacker*, 2 Vern. 301; *Arthington v. Fankes*, Ib. 356; — v. *Palmer*, 5 Vin. Abr. 7.

As to what buildings the lord may erect on the waste by the Statute of Westminster, 2, see *Neveill v. Hamerton*, 1 Sid. 79; 1 Lev. 62; 1 Keb. 283, 314; *Patrick v. Stubbs*, 9 M. & W. 830; but as that statute only applies to common of pasture, common of turbary or estovers must not be thereby injured. *Duberley v. Page*, 2 T. R. 391; *Shakespear v. Peppin*, 6 T. R. 747.

We have already sufficiently examined the rights of the commoners with respect to common of piscary, estovers and turbary.

With regard to their rights in the case of common of pasture, it must always be remembered that they have no interest in, and cannot meddle with, the soil, but have only a right to take the grass itself by the mouths of their cattle. Thus it has been held, that a commoner cannot make a trench or ditch on a common to let off the water unless authorized by custom (1 Roll. Abr. 406; 3 Cruise, Dig. 75). So likewise he cannot destroy or drive off the conies, or fill up their burrows. *Sir Jerome Horsey v. Hagberton*, Cro. Jac. 229; *Cooper v. Marshall*, 1 Burr. 259.

The lord, however, by his grant of the common gives everything incident to the enjoyment of it, as ingress and egress; and thereby authorizes the commoner to remove every obstruction to his cattle's grazing the grass

which grows upon such a spot of ground, because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate or a wall, to keep the commoner's cattle out, is inconsistent with a grant which gives them a right to come in. Per Lord Mansfield, C. J., 1 Burr. 265.

Where the lord of a manor conveys away part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners, as well over that part of the wastes which the lord has conveyed away as over that part which he retains in his own hands. Per Lord Kenyon, C. J., 8 T. R. 401.

VII. *Alienation of Rights of Common.*

Commons appendant will pass by the conveyance of the land to which they are annexed without any general words describing them as appurtenances (*Solme v. Bullock*, 3 Lev. 165; *Sacheverill v. Porter*, Cro. Car. 482; 2 Roll. Abr. 60); but they cannot be severed from the land by a separate conveyance without extinguishment (1 Roll. Abr. 401). The law is the same with regard to commons appurtenant (Ib. 402; *Drury v. Kent*, Cro. Jac. 14). Where, however, the right of common is limited, as for a certain number of cattle, it may be conveyed by a deed severing it from its connexion with the land (Ib.; and see *Leniel v. Harslop*, 3 Keb. 66). With regard to commons in gross, if the number of cattle is certain, they may be granted over by deed (*Hoskins v. Robins*, 2 Saund. 327); but not, it seems, if they are sans nombre. *Stampe v. Burgess*, 2 Roll. Rep. 73. And see 1 Ld. Raym. 407; sed vide *Jones v. Richard*, 6 A. & E. 530.

VIII. *Extinguishment of Rights of Common.*

Rights of common may be extinguished in various ways:—1. By unity of possession; 2. By release; 3. By severance; 4. By the dissolution of the estate to which they belong; 5. By enfranchisement; 6. By inclosure.

1. Unity of possession of the land, subject to the right of common appendant or appurtenant, and of the right itself, will, as laid down in *Tyrringham's Case*, extinguish the right. See also *Bradshaw v. Eyre*, Cro. Eliz. 570; *Nelson's Case*, 3 Leon. 128. The title, however, to the land must be as high and perdurable as that to the right. See ante, p. 78; *The King v. Hermitage*, Carth. 239; *Anon.*, Godb. 4.

2. Another mode of extinguishment is by release of the right by the commoner to the lord; and a release of part of the land from the right of common will it seems operate as a release of the whole. *Rotheram v. Green*, Cro. Eliz. 594; and see 8 T. R. 401; 1 Brownl. 180; 1 Show. 350; 3 Keb. 24.

3. Common appendant or appurtenant for cattle levant and couchant may be extinguished by severance, as where the commoner conveys away

the tenement to which the right is annexed, excepting the common. 1 Roll. Abr. 401; 4 Vin. Abr. 594, O, pl. 1, 2.

4. Where a corporation having a common in gross is dissolved, the right thereupon is extinguished. 27 Hen. 8, 10.

5. Where, on the conversion of a copyhold estate into an estate of freehold by a grant from the lord, a copyholder loses as it were his old estate, inasmuch as it never can become a copyhold estate again, for it ceases to be demisable by copy of court roll, his right of common will be extinguished. *Fort v. Ward*, Mo. 667; Cro. Jac. 253, cited.

Where, however, a copyhold tenement is seized into the hands of the lord, it does not, therefore, lose its right of common; for that right is annexed to all customary tenements demised or demisable by copy of court roll; and while the estate remains in the lord it continues demisable. *Badger v. Ford*, per Abbott, C. J., 3 B. & Ald. 153, 155.

So where the lord has approved a part of a waste, and enfeoffs one who has common appendant, his right of common in the residue of the waste will not be thereby extinguished. Dyer, 339 a.

6. Another mode of extinguishing rights of common is by inclosure, which may take place—1. Where the lord himself, or owner of the waste, as we have already seen, incloses, or as it is more properly called approves, so much of the waste as he pleases, provided he leave sufficient for those entitled thereto, and upon the approvement taking place, the land taken by the lord ceases to be common, and the rights of the commoner with respect to it are thereupon extinguished. 2. Where a person without any title originally, by mere encroachment has taken part of the waste, he will, after holding it for twenty years, have acquired an absolute title to it, so as to extinguish all rights of common thereupon. 8 & 9 Vict. c. 118, s. 52; and see 10 & 11 Vict. c. 111, s. 3.

If such encroachments are made by a tenant, although a contrary opinion was at one time entertained (*Doe d. Colclough v. Mulliner*, 1 Esp. 460), it is now clearly settled that a presumption arises, if they adjoin his farm, that they are made for the benefit of his landlord, and that presumption will not be rebutted unless it appear by some act done at the time that the tenant intended to make the encroachments for his own benefit, and not to hold them as he held his farm (*Doe d. Lewis v. Rees*, 6 Car. & P. 610; *Doe d. Dunraven v. Williams*, 7 Car. & P. 332); and the presumption will not be rebutted by the tenant showing a conveyance to his son; for, to use the expression of Alderson, B., "to give the conveyance that effect, it ought to have been an open act, which would have been inconsistent with such presumption." *Doe d. Lloyd v. Jones*, 16 L. J., N. S., Exch., 58, 61.

3. Inclosure may take place by agreement between all parties interested, viz. the owner of the soil and the parties claiming rights of common. This mode of procedure is in general impracticable, not only from the difficulty in getting a numerous body to give their assent, but also, because in general

many have not, on account of infancy, coverture or otherwise, the power to give it. This has rendered the assistance of the legislature necessary.

4. The inclosure of commons, so frequent of late years, has rendered much less usual than formerly the rights of common possessed by tenants of manors over the lord's wastes. These inclosures were, until recently, effected by private acts of parliament, obtained for the purpose of each particular inclosure, subject to the provisions of the General Inclosure Act (41 Geo. 3, c. 109; and see also stats. 3 & 4 Will. 4, c. 87; 3 & 4 Vict. c. 31), which contained general regulations applicable to all. But by a recent act of parliament, stat. 8 & 9 Vict. c. 118, amended by stat. 9 & 10 Vict. c. 70, extended by 10 & 11 Vict. c. 111, further extended by 11 & 12 Vict. c. 99, and 12 & 13 Vict. c. 83, and continued by 14 & 15 Vict. c. 53, commissioners have been appointed, styled the Inclosure Commissioners of England and Wales, under whose sanction inclosures may now be more readily effected, several local inclosures being comprised in one act.

The rights of common possessed by owners of land in common fields, however useful in ancient times, are now found greatly to interfere with the modern practice of husbandry; and acts have accordingly been recently passed to facilitate the exchange (4 & 5 Will. 4, c. 30) and separate inclosure (6 & 7 Will. 4, c. 115) of lands in such common fields. Under the provisions of these acts, each owner may now obtain a separate parcel of land, discharged from all rights of common belonging to any other person. Will. Real Prop. 267.

SURY v. PIGOT (a).

Int. Hill, 1 Car. Rot. 124.

[REPORTED POPH. 166.]

EASEMENTS.]—*A. was possessed of a rectory, of which a curtilage was parcel. From time immemorial a watering place for cattle, &c., existed in the said curtilage, and a stream had flowed through a piece of land called the hopyard to fill the pond at the watering place. A. afterwards purchased the hopyard, and thus became possessed of the rectory and hopyard at the same time. He then sold the hopyard to B., under whose title the defendant entered and obstructed the watercourse by erecting a stone dam across it within the limits of the hopyard:—Held, that the right to the watercourse was not extinguished by the unity of possession, and that the plaintiff was entitled to recover for the obstruction.*

A watercourse having its origin ex jure naturæ, and not from grant or prescription, is not extinguished by unity of possession.

A right of way, however, having its origin either by grant or prescription, will be extinguished by unity of possession, unless it be a way of necessity, as a way to market or church.

Semble, a warren is not extinguished by unity of possession, because a man may have a warren on his own land.

If a person having a mill on part of his land, with a watercourse to it passing through another part of his land, sell the mill, he cannot stop the watercourse.

Where a man hath a house and ancient windows in it, and another person erect a new house and stop up the light, an action on the case will lie.

A. by prescription being bound to keep up a fence between his close and B.'s, purchases B.'s close, and permits them to be open without any

(a) *S. C. Noy, 84; Latch. 153; nom. Surrey Shury v. Piggott; Sir W. Jones, 145. v. Piggott, Palmer, 444; 3 Bulst. 339, nom.*

fence between them. On A.'s death, leaving two daughters who make a partition, one of the closes being allotted to each of them,—
Semble, the prescription to keep up the fence is destroyed by unity of possession.

IN an action upon the case for stopping his watercourse, the plaintiff declares that, 14 Octob. 22 Jac., he was possessed of the rectory of M. in Berkshire, of which a curtilage was parcel, and that in this curtilage is, and hath been time out of mind, a watering place, for the watering of the cattle of the plaintiff and others, and for other necessary uses, and that a certain watercourse had, time out of mind, flowed from Mildford stream to this curtilage, and that this water filled the said pond; and further, that the defendant, well knowing this, and intending to dam up the said watercourse, built a stone wall thereupon, whereby the watercourse was stopped up, to the plaintiff's damage of 20*l.*, and this was laid with a continuendo. The defendant pleaded that, 3 Henry 8, the said Henry 8 was seised of the manor of, &c., and of the said rectory in his demesne as of fee, and of a certain piece of land called the hopyard, lying between the said watering place and the said stream, and by his letters-patent granted this to William Box and his heirs, by virtue whereof he was seised. Francis Searles entered upon him and was seised, and enfeoffed Pigot, 20 Jac., by virtue whereof he was seised, &c.; and the three others justify as servants to Pigot, that they the said day and year filled up the said watercourse, as it was lawful for them to do; and that this is the same trespass, &c. The plaintiff demurs. And the question is, whether the unity of possession of all in Henry 8 hath extinguished the watercourse.

Dorrell, for the plaintiff, argued that if it were the case of a common, it was clear that it was destroyed, because common ought to be in another man's land, but not in our case, for if one prescribe to have warren, if he purchase the land yet he shall have warren, 11 H. 7, 25. There are two houses, and the one prescribes that the other shall mend the gutter, and afterwards they come to the hands of one man, and then he alien one of them, this unity shall destroy the mending of the gutter.

Bear, for the defendant, argued that the unity hath destroyed the custom, 21 E. 3, 2. A way is but an easement, yet by the purchase of

the land the way is extinguished; and also the watercourse is not only an easement but a profit, à prendre; and he cited Dyer, 295, b. 19, in case of an inclosure, that the inclosure is extinguished, but there is made a quære; and he cited 38 Eliz. in C. B., an opinion that by purchase of a close the inclosure is extinguished; à fortiori here because it is a profit. And for the case of 11 H. 7, 25, it is by the custom of London; but there is no custom in our case, and the case of a warren is not like to our case, because a man may have warren in his own soil.

Barksedale, for the plaintiff, in Michaelmas Term next, argued that the unity of possession in H. 8 had not extinguished the watercourse, and that the *terminus ad quem* and the *medium* also being in one, had not extinguished nor destroyed it. And *Benedicta est expositio quando res redimitur a destructione* (4 Co. 26). The law will not destroy things, but the law will sometimes suffer a fiction (which is nothing in *rerum naturâ*) *ut res magis valeat quam pereat*. I confess that profit à prendre as common or rent is extinguished by unity of possession; for common it appeareth in 4 E. 3, 45, 46, and in *Tyrringham's Case*, 4 Co. 36 b, ante, p. 78; and for rent it appeareth in 4 H. 4, 7; and in 21 E. 3, 2, it appeareth that a way is extinguished by unity of possession, 3 H. 6, 31, Brooke, Nusans, 11; for it is repugnant for a man to have a way upon his own land. But I conceive that our case differs from the case of a way, and for this reason, that where the thing hath a being and existence, notwithstanding the unity, there it is not destroyed by the unity, but the watercourse hath a being notwithstanding the unity, ergo, &c. I will prove the major proposition by these cases:—35 H. 6, 55, 56, Where a warren is not extinct by a feoffment of the land, for I may hawk and hunt on my own land as on another man's, so the warren hath existence notwithstanding the unity. Dyer, 326, Where the Queen was seised of Waddon Chase, and the Lord Gray was lieutenant there in fee, and he and his ancestors and their keepers had by prescription used to hunt wandering deer in the demesnes of the manor of S. adjoining as in purlieu. The manor of S. comes into the Queen's hands, who grants this to Fortescue in fee, with free warren within the demesnes, &c.: it was holden that the unity doth not extinguish the purlieu. Dyer, 295, Two closes adjoin, the one by prescription is bound to keep up a fence, the owner of one purchases the other, and suffers the hedges to decay, and dies, leaving two

daughters his heirs, who make partition: quære, whether the prescription for the inclosure be revived; true it is that it is made a quære, but he saith, see the like case, 11 Hen. 7, 25, of a gutter which proves our case, as I will show afterwards.

For the minor proposition that, the watercourse hath being, notwithstanding the said unity, I will prove it by 12 Hen. 7, 4; a præcipe quod reddat of land, aquâ co-operta. Mich. 6 Jac., *Challenor and Moore's Case*, an ejectione firmæ was brought of a watercourse, and it was there resolved that it does not lie, because it is not *firma*, sed *currit*; but of *terra aquâ co-operta* it doth lie. Also I will take some exceptions to the bar. 1. There is no title in the bar for the defendant Pigot, and so we being in possession, albeit in truth we have no title, yet he who hath no title cannot oust us, neither can stop the said watercourse, and it is only shown in the bar that Searles entered and enfeofed Pigot, but for anything that yet appears, the true owner continued in possession. 21 Jac. C. B., *Cook against Cook* in a writ of dower, the defendant pleads an entry after the darrein continuance, and doth not plead that he ousted him, and upon this the plaintiff demurs; and it is there adjudged that it is no plea in bar, because he doth not say, that the defendant entered and ousted the tenant. 2. Exception, the action is brought against four, scil. Pigot, Cole, Branch and Elyman; and Pigot hath conveyed a title from Searles, the three other defendants justify; but Pigot doth not say anything but that Searles enfeofed him. 7 Hen. 6, an action of waste is brought against many, one answers, and the other not, this is a discontinuance. And for the principal matter, I will conclude with 11 Hen. 7, 25; Bro. Extinguishment, 60, two have tenements adjoining, and the one hath a gutter in the other's land, and afterwards one purchases both, and then he aliens one to one, and another to another, the gutter is revived notwithstanding the unity, because it is very necessary, and so he prayed judgment for the plaintiff.

Bear, for the defendant.—I, in a manner, agree with all the cases which have been put on the other side; and I conceive that the watercourse is not *stagnum* but *servitium*, which is due from the one land to the other. It is but a liberty, and therefore I agree with *Challenor's Case*, which is but a liberty, that an *ejectione firmæ* doth not lie of it, but *ejectione firmæ* lies *de stagno*.

For the first exception I answer and confess, that to allege an entry

after the darrein continuance, without alleging an ouster of the tenant, cannot abate the writ, for the defendant may enter to another intent as appeareth in the Commentaries, and with the assent of the tenant; but here it was alleged, that a feoffment was made, and a livery which implies another.

For the matter in law, I conceive that the watercourse is extinguished, and it may be compared to 21 E. 3. 2. The case of a way which is extinguished by unity of possession, *Hemdon and Crouche's Case*, Hill. 36 Eliz. Rot. 1332. Two were seised of two several acres of land, of which the one ought to inclose against the other, one purchases them both, and lets them to several men, and there the opinion was, and it was adjudged accordingly, that the inclosure is not revived, but remains extinguished. In *Harrington's Case*, 39 Eliz., the same thing was resolved; and albeit in *Dyer*, 295, is a quære, yet the better opinion hath been taken according to these resolutions. In *Jordan and Atwood's Case*, Owen, 121, when one had a way from one acre to another, and afterwards purchased the acre upon which he had the way, and afterwards sold it, in that case the opinion of three justices was, that the way was extinguished. Also 11 H. 4, 50, and 11 H. 7, 25, prove this case, for the said case is compared to the custom of Gavelkind and Burrough English, and there the quære is made whether by the custom it be revived, and if it be a custom which runs with the land, the unity of possession doth not extinguish it. Common appendant is destroyed by unity of possession, and yet it is a thing of common right, *Tyrringham's Case*, 4 Co. 36 b, and 24 E. 3, 2; but a watercourse being a thing against common right, *à fortiori* it shall be extinguished. Now I will take some exceptions to the declaration.

1. Because he hath laid a prescription for a watercourse, as to say, that it was belonging to a rectory, to which &c., and this is a good exception as appears by *Iseham's Case*, 6 Eliz. 6 *Dyer*, 70 (b), where exception was taken, that before his prescription he doth not say that it was *antiquum parcum*, which exception (as it is there said) was the principal cause that judgment was given against him; and also, as the case is here, it ought to be a rectory inappropriate, and this cannot be before the time of H. 8, which is within time of memory, for before the said time no lay person could have a rectory inappropriate, and therefore I pray judgment for the defendant.

Barksdale said, the prescription was well laid, and he would prove that by 39 H. 6, 32, and 33 H. 6, 26.

Per Curiam.—The prescription is good enough, and albeit it is not said, that it is *antiqua rectoria*, yet it is well enough, Mich. 1 Car. at Reading Term, in *Brock and Harris's Case*, he doth not say that it was *antiquum messuagium*, and yet it was resolved good.

Doddridge, J.—The case of 6 E. 6, differs in this point from this case, for a rectory shall always be intended ancient, and so is not a park, for it may be newly created. And he put this case; suppose I have a mill, and I have a watercourse to this in my own land, and I sell the land, I cannot stop the watercourse.

Crew, C. J., seemed of opinion that the prescription was gone, and that the better opinion in *Dyer*, 295, 13 Eliz., had always been, that the inclosure is gone by unity of possession, but yet the watercourse is matter of necessity.

Doddridge and Whitlocke, JJ.—The way is matter of election, but the course of water is natural.

Jones, J.—There is great difference between a way and a watercourse as to this purpose; for admit that this watercourse, after that it had been in the curtilage of the plaintiff, goes further to the curtilage of another, shall not that other have the benefit of this watercourse, notwithstanding the unity of possession? I think clearly that he shall.

Doddridge, J.—My opinion is, that the watercourse is not extinguished by the unity of possession. [But some conceived that he had declared his opinion in terror to the defendant.]

Barksdale, afterwards the same term, for the plaintiff, said, that he had argued the case before, and therefore would now only endeavour to answer some exceptions which had been taken to the declaration. 1. Exception hath been that no prescription or custom is made for this watercourse, but only that *currere solebat et consuevit*. But I conceive that the declaration is good notwithstanding this, because the plaintiff here doth not claim an interest in the watercourse, but in the land in which, &c., and therefore it is good, and this appeareth by 12 E. 4, 9, the *Prior of Lantonys's Case*, in a prescription in a market overt generally, and the reason there was, because he was a stranger, as in

our case he is, and this pleading appeareth also to be good by Coke's Book of Entries, 18, *Smyth's Case*, which was entered 9 Jac. Rot. 366, in this Court, 2. Exception was, because it is not said, that it was antiqua rectoria. 3. Exception, because it doth not appear that he was a spiritual man to whom the demise of the rectory was made. 4. Because it is not said that the watercourse *ad predict. rectoriam pertinet*. 5. Because the watercourse is alleged to be for his customary tenants of the said rectory, and this is not good, as appeareth by 21 Eliz. Dyer, 363. Prescription *pro quolibet customar. tenente* is not good, but I conceive that this is not our case, for here is *customarius tenens rectoria*, and there it is agreed that *quolibet customarius tenens maner.* had been good. And the plea in bar hath salved these objections, and therefore he prayed judgment for the plaintiff.

Jeremy, for the defendant.—And first for the matter in law, it seemed to him that by the unity of possession the watercourse is extinguished, and the watercourse may well be compared to the case of the way, for as a way is a passage for men over the land, so water hath passage upon the land, and a way is extinguished by unity, as appeareth by 21 E. 3, 2; 11 H. 4, 5; 21 Ass. and Davys's Reports, 5; and in 4 Jac. *Jordan and Atwood's Case*, Owen, 121, it was the better opinion, that a way was extinguished by unity of possession; true it is, that there Popham, C. J. put the difference, where the way is of necessity and where not; for where the way is of necessity, there it shall not be extinguished. This case hath been compared to the case of a warren in 35 H. 6, 55; but I conceive that the cases are not alike, because a warren is a mere liberty, 8 H. 7, 5. A man may have a warren in his own land, and *Butt's Case*, 7 Co. 23 a, by a feoffment of land, a warren doth not pass; but this watercourse hath its original out of the land, and this case cannot be compared to an ancient watercourse running to a mill, for notwithstanding the unity it shall pass with the mill, for otherwise it shall not be molendinum aquatinum, so that the water there is parcel of the thing, and so of necessity ought to pass with the thing; but here it doth not appear that it is a watercourse of necessity, and for anything that appeareth, it may be filled with another watercourse. Also I conceive that the declaration is not good;—1. Because neither prescription nor custom is laid for the watercourse, and it appeareth in Co. Book of Entries, *Holcome and Evans's Case*, and the old Book of Entries, 616, 617, Mich. 1 Car. Rot. 107, *Turner and Dennie's Case*, in this Court, in trespass for breaking his close, &c., the defendant justified for a way, &c., and that he was possessed for

years, and for him and his occupiers had a way over the land, the plaintiff demurred and it was resolved, that the prescription was not good. 2. The declaration is insufficient, being an action upon the case for the stopping of a watercourse, and it is not *vi et armis*, nor *contra pacem*, the *Earl of Shrewsbury's Case*, 9 Co. 50, when there are two causes of an action upon the case, the one *causa causans*, the other *causa causata*, *causa causans* may be alleged *vi et armis*, for this is not the immediate cause of the action, but *causa causata*, F. N. B. 86, 12 H. 4, 3, 8 R. 2, and 29 E. 3, 18 b, in the end of the writ of action upon the case, shall be *contra pacem*. 3. Also he hath prescribed for the tenants of the rectory, which is not possible, for no layman could be tenant of a rectory, or of tithes before the statute of H. 8, and therefore I pray judgment for the defendant.

Whitlocke, C. J.—I conceive that the declaration is good, and the bar naught, both for the form and matter. The question here is of *aqua profluens*, and I conceive that there needs no prescription or custom in this case, for water hath its natural course; and, as is observed by Brudnell in 12 H. 8, *naturâ suâ descendit* (c), it may be called *usu-captio* or usage, and I conceive that the action upon the case very well lies in this case, like to the case where a man hath a house and windows in it, and another erects a new house and stops the light, then he may have an action upon the case; but true it is, that he shall not only count for the loss of the air, but also he ought to prescribe that time out of mind light had entered by these windows, &c., see 7 E. 3. If there be a schoolmaster in a town, and another erect a new school in the same town, an action upon the case doth not lie against him, because schools are for the public benefit, and every private man may have a school in his house. And for the exception, that a layman cannot be possessed of a rectory, I conceive that the declaration is good notwithstanding, for a layman may have a rectory by demise.

And for the plea in bar, it is not good for the form, because that Searles entered and enfeoffed Pigot, and it is not said that he entered and expulit; and if a man enter and make a feoffment, the owner being upon the land, the feoffment is void, and therefore an actual ouster ought to be shown. And for the matter in law, I conceive that the bar is not good, for by the unity of possession the watercourse is not extinguished, and yet I agree with the cases of a way and common upon the differences of rights which are put in Bracton, lib. 4, 221. These

(c) See *Wood v. Waud*, 3 Exch. 775.

are called *servitudes*, as *jus eundi, fodiendi, hauriendi, &c., sunt servitudes quas prædia ex quibus exeunt aliis prædiis debent*, and are called *servitudes prædiales*, and this began by private right, to wit, by grant or prescription.

A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by the consent of parties, nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own land; and in the case of 11 H. 7, 25, the gutter was not extinguished only by the unity of possession, but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived; and although in the book of the 13 Eliz., Dyer, 295 (d), where two closes adjoin together, the one being by prescription bound to keep up a fence, and the owner of the one purchase the other, and dies, leaving issue two daughters who make partition, it is a quære whether the inclosure be revived, yet I conceive clearly, that by unity of the possession the inclosure is destroyed, for fencing is not natural, but comes by industry of men, and therefore by the unity it shall be gone; and so briefly, with this diversity he concluded that where the thing hath its being by prescription, unity will extinguish it; but where the thing hath its being *ex jure naturæ*, it shall not be extinguished, and therefore the plaintiff ought to have judgment.

Jones, J.—I agree that the declaration is good, and that the bar also is good in manner, but for the matter in law it is not good.

As to the first exception to the declaration, I conceive it is good, albeit there wants a prescription, and this is the ordinary of pleading, as appears in *Luttrell's Case*, 4 Co. 86, and in all the precedents before cited.

2. For the exception *vi et armis*, I conceive there is this difference, where the act is a trespass and a nuisance, there it may be laid to be *vi et armis*; but if it be a nuisance only, and not a trespass, it is otherwise: as if I have a way over another man's land, if a stranger dig in the land so that I cannot have the way, now because it is a trespass to the owner of the soil, in my action upon the case against a stranger I may have *vi et armis*; but if the owner stop the way, there *vi et armis* shall not be in my action upon the case.

For the third exception, because he doth not say *ad rectoriam spec-*

(d) See *Boyle v. Tamlyn*, 6 B. & A. 337.

tandam (a), but I conceive that it shall be intended ad rectoriam impropriat. and so it appeareth.

4. Where it is said watercourse for his tenants, I conceive it is good enough, being in an action upon the case where damages only are to be recovered. The bar also is good in form; for although the tenant here be a disseisor, yet it is a good bar, for it matters not whether he hath a title or not, if the watercourse be extinct by the unity. For the matter in law, I conceive that the unity of possession has not extinguished the watercourse. A man hath things out of another man's land, either by grant as a seignior, rent, common, &c., and these are extinguished by unity, &c.; and the reason is, because one who hath interest as owner of the land cannot have a particular interest in the same land also. Or by prescription, and those things are extinguished by unity of possession also, and not only for the first reason, because he is owner of the land and so cannot have a particular interest in the same land also, but also because that by the unity the prescription fails. And for the case in *Dyer*, 295, 13 Eliz., I conceive that by the unity the inclosure is gone, and so it was resolved in 37 Eliz., for every one is not bound to inclose. For the case of the way, I will suspend my opinion concerning it, because *Clark and Lamb's Case* is now depending, touching it in the same point.

But now for our case; it differs from the other cases, for the prescription here is in another manner than is made for common, for it shall be pleaded either as appendant or appurtenant; but *currere solebat* is only in this pleading, for here no interest is claimed, but in the other cases an interest is claimed. In this case the land remains as it was before, and therefore the unity will not extinguish it; and if such a unity by construction of law should extinguish watercourses, it would be too dangerous: for suppose a man hath a watercourse from the Thames to his house in Lambeth, if he purchase a parcel of land in Henley; now, because that the Thames comes by the same land, shall his watercourse be extinguished? Also suppose that the watercourse, after it hath been in the curtilage of the plaintiff, goes into another curtilage, is it reason that by this unity the second man shall lose his watercourse? Without doubt it is unreasonable. And the case of 11 H. 7, 25, of the gutter, warrants this opinion, and therefore the plaintiff ought to have judgment.

Doddridge, J.—I conceive no great difficulty in the case; for the exceptions to the declarations they are not material.

(a) Qy. antiquam.

1. That there wants prescription or custom, I conceive that it is good enough, for here are the words of *currere solebat et consuevit*, and *consuevit* is a good word for a custom.

2. That a layman cannot have a parsonage. True it is, that a layman cannot be a parson, but he may have a parsonage, for he may be lessee of it, which appeareth many times in our books.

3. That it is not alleged to be *vi et armis*. This is the most colourable exception, and the case and rule cited out of *The Earl of Shrewsbury's Case*, 9 Co. 50, is good law; but it is impossible to plead *vi et armis* in this case, for the unity was in H. 8, and the wrong is supposed after the severance, and it is supposed to be done by the owner of the land, and a man cannot do a thing upon his own land *vi et armis*.

4. Because it is not alleged to be an ancient rectory. I conceive it need not, because the law presumes all rectories to be ancient, the patronages whereof are gained *ratione fundi*, fundationis, vel dotationis.

5. Because he doth not say that *pertinet ad rectoriam*. But he hath said a thing which amounts to as much; for it is said, that in the rectory was a certain curtilage in which there is a watering-pond, and the curtilage is part of the house; and, therefore, he need not say that it belongs to the house. For the bar, I conceive that it is good for the manner. A man makes a feoffment of land, the owner of the land being present at the same time, nothing works by the livery, for the reason before given by Jones, J. For the matter of law, I conceive that the unity of possession doth not extinguish the watercourse, and that for two reasons:

1. For the necessity of the thing.

2. From the nature of the thing being a watercourse, which is a thing running.

1. For the necessity; and this is the reason that common appendant, by the unity of possession, shall not be extinguished, for it is appendant to ancient land hide, and gain arable land, which is necessary for the preservation of the commonwealth; and as in this case there is a necessity of bread, so in our case there is a necessity of water. And for the case of a way *distinguendum est*; for if it be a way which is only for easement, it is extinguished by unity of possession; but if it be a way of necessity, as a way to market or church, there it is not extinguished by unity of possession; and accordingly was the opinion of Popham, C. J. (a), which I take for good law; and the case of 11 H. 7, 25, is a notable case, and there a reason is given why a

(a) In *Lady Brown's Case*, cited more fully Palm. 446.

gutter is not extinguished by unity of possession, because it is a matter of necessity.

2. From the nature of water, which naturally descends, it is always current, et aut invenit aut facit viam; and shall such a thing be extinguished which hath its being from the creation? *Luttrell's Case*, 4 Co. 86, a mill is a necessary thing, and if I purchase the land upon which the stream goes which runs to this mill, and afterwards I alien the mill, the watercourse remains. So if a man hath a dyehouse, and there is water running to it, and afterwards he purchase the land upon which the water is current and sell it, yet he shall have the watercourse, Dyer. *Dame Brown's Case*, and the principal case in *Luttrell's Case*, a fulling-mill made a water-mill, this shall not alter the nature of the mill, but yet it remains a mill; so the water hath its course notwithstanding the unity. And he concluded for the plaintiff.

Crew, C. J.—I agree that the declaration is good, and also that the bar is good for the manner; but for the matter in law, I conceive that it is not good. In our law every case hath its stand or fall from a particular reason or circumstance. For a warren and tithes, they are not extinguished by unity, because they are things collateral to the land. And for the case of 13 Eliz. in Dyer, 295, of an inclosure, I conceive that by the unity the inclosure was destroyed, for the prescription was interrupted, and in *Day and Drake's Case*, 3 Jac., in this Court it was adjudged that in the same case the prescription was gone. It may be resembled to the case of *Homage Ancestrell*, 57 E. 3, Fitzherbert, Nusans. And for our case, it is not like to the cases of common or a way, because the watercourse is a thing natural, and therefore by unity it shall not be discharged; also there is a linement (a) out of which every man shall have a benefit; and therefore he concluded that judgment should be given for the plaintiff. And judgment was commanded to be entered for the plaintiff.

Sury v. Pigot, a case found in so many reports, is a leading authority on the law of Easements. "The case," says Mr. Justice Story, "is most fully reported in Popham; it is also reported in Noy, 84; Palmer, 444; William Jones, 145; and 3 Bulst. 339; but without any essential difference. It does not appear to me that there is any difficulty in admitting its entire correctness. It proceeds upon this plain principle, that a privilege which was annexed to, and in actual use with the rectory during the unity of possession,

(a) Qy. Tenement.

and was not parcel of the other land, or a profit à prendre out of that land, was to be considered as still existing as an appurtenance or privilege annexed to the rectory, notwithstanding the unity of possession. The running water over the hopyard was not parcel of the hopyard, or an easement growing out of it. But if, during the unity of possession, the privilege had been disannexed by the owner, as if the owner had during that period stopped the watercourse and thus destroyed the privilege, the case would have been otherwise. A subsequent grant of the rectory would then have conveyed only the privileges actually in existence and use at the time of the conveyance." 3 Mason's Rep. 277, 278; see also *Pheysey v. Vicary*, 16 Mees. & W. 484.

It is proposed in this note, to consider the law of Easements, so ably discussed in the principal case, in the following order:—

First, what constitutes an easement. *Secondly*, how an easement may be acquired. *Thirdly*, the incidents of easements. *Fourthly*, the disturbance of easements, and the remedies in respect thereof. *Fifthly*, the extinguishment of easements.

I. *What constitutes an Easement.*

We may define an easement to be a right, which the owner of one tenement, which is called the dominant tenement, has over another which is called the servient tenement, to compel the owner thereof to permit to be done or to refrain from doing something on such tenement for the advantage of the former. Thus if the owner of estate A. has a right of way over estate B., he can compel the owner of estate B. to permit him to go along the way. So if the owner of estate A. has ancient lights in a house on his estate, he can compel the owner of estate B. not to do any act on his own land, which will deprive him of his accustomed portion of light and air.

The former kind of easement is termed affirmative, the latter negative.

Of affirmative easements, that is to say, where the owner of the servient tenement must permit some act to be done thereon (in addition to a right of way by the owner of the dominant tenement), may be mentioned, the right to discharge a stream of water along a certain channel, or rain water by spout or projecting eaves (*Thomas v. Thomas*, 2 Cr. M. & R. 34; 11 Hen. 7, 25 b), the right to support from a neighbouring wall to hang clothes on a line passing over the neighbouring soil (*Drewell v. Towler*, 3 B. & Ad. 735); to bury the dead in a particular vault (*Dawney v. Dee*, Cro. Jac. 606; *Bryan v. Whistler*, 8 B. & C. 288; 2 Man. & Ry. 318); or to carry on an offensive trade. *Bliss v. Hall*, 5 Scott, 500.

Of negative easements may be mentioned, in addition to the right to receive light and air by windows, the right of support from the neighbouring soil, and to receive a flow of water. See Gale, Easements, 16.

Among the distinctive characteristics of easements are the following. They are incorporeal (*Henlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783), and are imposed upon corporeal property, and not the owner of it; so that, although the owner of the servient tenement may be changed, the right to the easement still remains in the owner of the dominant tenement (*Taylor*

v. *Whitehead*, 2 Doug. 749; *Bullard v. Harrison*, 4 Mau. & Sel. 387; *Pomfret v. Ricroft*, 1 Saund. 322). They must be also imposed for the beneficial enjoyment of real corporeal property (21 Ed. 3, 2, pl. 5; *Bailey v. Appleyard*, 3 Nev. & Per. 257); though they give no right to the owner of the dominant tenement to take any profits, or, as it is termed in our old law books, profit à prendre, as in the case of commons. *Manning v. Wasdale*, 5 A. & E. 758; 1 Nev. & Per. 172; *Blewett v. Tregonning*, 3 A. & E. 554; 5 Nev. & Man. 308; *Bailey v. Appleyard*, 3 Nev. & Per. 257.

Lastly, the two tenements—the dominant and the servient—must belong to two different persons; for if they become the property of the same person, the easement, as is laid down in the principal case (ante), will in general be merged in the ownership. See post.

It may here be mentioned, that what we term easements, from their being for the ease and benefit of the owner of the dominant tenement, were in the Roman law termed servitudes, from their being a burden imposed upon the owner of the servient tenement.

Predial or landed servitudes or easements have been divided, in the Roman law, into rustic and urban; but in the English law a distinction of this kind seems to lead to no useful purposes. Inst. ff. de Serv. ss. 1, 2; Vinn. ad Inst. lib. 2, tit. 3.

II. Mode of acquiring Easements.

An easement may be acquired—1. By express grant; 2. By implied grant; 3. By prescription.

1. Easements by express Grant.

Where an easement is created by express grant, the instrument by which it is created must be under seal. The grant, however, of an easement may be made either separate from or together with the dominant tenement, and a covenant or other instrument under seal, showing the intention of the parties, may take effect as a grant. *Holmes v. Seller*, 3 Lev. 305; Com. Dig. Chimin, D 3; *Senhouse v. Christian*, 1 T. R. 560; *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109.

Where there is a conveyance of the dominant tenement, it appears that all easements will pass as appendant. 11 Hen. 6, 22 pl. 19; 2 Roll. Abr. 60, pl. 1; *Beaudely v. Brook*, Cro. Jac. 189; *Canham v. Fiske*, 2 Cr. & J. 126.

Difficulties, however, often arise in determining what easements pass by a conveyance of the dominant tenement, when there has been a unity of possession of the dominant and servient tenement. These, however, will be hereafter considered.

A mere parol licence, at law, confers no title to an easement, and may be recalled at any time, even though money have been paid for it, and without repayment of the money (*Wood v. Leadbitter*, 13 M. & W. 838; overruling *Taylor v. Waters*, 7 Taunt. 374; 2 Marsh. 551). In the leading case of

Hewlins v. Shippam, 5 B. & C. 221; *S. C.* 7 D. & R. 733, the plaintiff being lessee of an inn, for valuable consideration, obtained the assent of the defendant and his landlord, to his making a drain across the yard of the defendant, whereby he incurred considerable expense. In an action for stopping up the drain, the plaintiff was nonsuited, and a rule nisi obtained by him was discharged. Bayley, J., in delivering the judgment of the Court, observed, "A right of way, or a right of passage for water (where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed." See also *Bryan v. Whistler*, 8 B. & C. 288; *S. C.* 2 Man. & Ry. 318; *Bradley v. Gill*, 1 Lutw. 70; *Cocker v. Cowper*, 1 C. M. & R. 418; *Wallis v. Harrison*, 4 M. & W. 538; *Bird v. Higginson*, 6 A. & E. 824.

A parol licence, however, will be an excuse for a trespass, until it be countermanded. Per Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 233.

Where, however, an agreement for valuable consideration has been entered into for the use of an easement, at any rate where the owner of the servient tenement has stood by and allowed the expenditure of money on the faith of such agreement, a Court of Equity will not allow him to recall the licence, and will compel him to execute a proper deed of grant. Thus, in the case of *The Duke of Devonshire v. Eglin*, 14 Beav. 530, the defendant agreed, in consideration of a yearly rent, that a watercourse for supplying a town with water should pass under his land, and upon the faith of that agreement, a considerable sum of money was laid out in making the watercourse. No grant was ever executed, and, in about nine years after its construction, the defendant, in consequence of some disputes, stopped up the watercourse. Upon a bill being filed by the plaintiffs, praying a declaration that they were entitled to the use and enjoyment of the watercourse, and for an injunction to restrain the defendant from obstructing the flow of water through his land, the defendant admitted that he consented to the passage of the water through his land, "upon condition of his being paid a proper and reasonable sum or price for that consent and permission;" but he said, that no sum had at any time been agreed on, between him and the plaintiffs, as the price of such consent or permission: Sir J. Romilly, M. R. held, that, under the circumstances of the case, the defendant could not prevent the plaintiff's enjoyment of the easement; and a decree was made declaring them entitled to the easement, and referring it to the Master to ascertain a proper rent, and settle a proper deed, and granting a perpetual injunction in the terms prayed. See also *Anon.*, 2 Eq. Ca. Abr. 522, pl. 3; *Clavering's Case*, cited 5 Ves. 690, and 6 Hare, 304, n.; *Jackson v. Cator*, 5 Ves. 688; *Gregory v. Mighell*, 18 Ves. 328; *Williams v. Earl of Jersey*, Cr. & Ph. 91; *Powell v. Thomas*, 6 Hare, 300; *Earl of Oxford's Case*, 2 L. Cas. Eq. 442, 457.

It appears also that even at law, where the owner of the dominant tenement gives the owner of the servient tenement a right to use his *own* land in a way in which, but for an easement of the owner of the dominant tenement, he would have had a clear right to use it, such licence is not countermandable, at any rate after it has been executed and expenses have been incurred on the faith thereof. Thus in *Liggins v. Inge*, 7 Bing. 682, where the plaintiff's father, by oral licence, permitted the defendants on their own land to lower the bank of a river and make a weir above the plaintiff's mill, whereby less water than before flowed thereto, it was held by the Court of Common Pleas that the plaintiff could not sue the defendants for continuing the weir. "We think," said Tindal, C. J., "the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burden of restoring to its former state what has been done under the licence, although such licence is countermanded; and, consequently, that they are not liable to an action as wrongdoers for persisting in such refusal." See also *Webb v. Paternoster*, Poph. 151; 2 Roll. Rep. 152; *Winter v. Brockwell*, 8 East, 308.

2. *Easements by Implied Grant.*

Easements by implied grant arise, first, upon the severance by the owner of a tenement into two or more parts; secondly, by prescription.

With regard to easements arising upon severance of an heritage, a grant will be implied.

First, of those easements of continuous and apparent character, which were actually used by the owner during the unity of possession, although they had not, during that period, in strict law the character of easements. Secondly, of easements of necessity, viz. those which are necessary for the use of the severed part of the inheritance.

Implied Grant of Continuous and Apparent Easements on severance of a Tenement into Parts.

Where the owner of two tenements sells one, a grant will be implied of those continuous and apparent easements which, during the unity of possession, were enjoyed under the title of ownership. For instance, where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possessing the adjoining land, sells the house to another person, although the lights be new, he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. The reason is founded on the rule that "a man cannot derogate from his own grant;" for it would be manifestly unjust, when a person had purchased the house, having the apparent and continuous enjoyment of the lights, that he should be deprived of this by the act of the person from whom he purchased (*Palmer v. Fletcher*, 1 Lev. 122; *S. C. nom. Palmer v. Fleshees*, 1 Siderf. 167; *Palmer v.*

Flessier, 1 Keb. 553, 625, 794; *Cox v. Matthews*, 1 Vent. 237, 239; *S. C. Rosewell v. Pryor*, 6 Mod. 116; *Compton v. Richards*, 1 Price, 27; *Riviere v. Bower*, 1 Ry. & Moo. 24; *Coutts v. Gorham*, Moo. & Malk. 396). The same principle will be applicable where the severance takes place by the sale of two parts of an inheritance to two strangers at the same time. Thus in the case of *Swansborough v. Coventry*, 9 Bing. 305, a person sold a house to the plaintiff, and at the same time the adjoining land, upon which an erection of one story high had formerly stood, to the defendant. In the conveyance to the plaintiff, his house was described as bounded by *building ground* belonging to the defendant. It was held by the Court of Common Pleas that the defendant was not entitled to build to a greater height than one story, if by so doing he obstructed the plaintiff's lights.

Upon the same principle, where the owner of two closes sells one with a run of water upon it, neither the vendor nor any other person claiming under him can obstruct or divert that water, although the conveyance of the land contained no grant of the water. "The conveyance," to use the words of Bayley, J., "passes the land with the easements existing at the time." *Canham v. Fiske*, 2 C. & J. 126, 128. So in the principal case where there was no grant of the stream of water by the person who held the two tenements before a severance, it is laid down by Whitlocke, C. J., "that there needed no prescription or custom, for water hath its natural course; and as was observed by Brudnell in 12 H. 8, "naturâ suâ descendit."

Where, however, the easement is not continuous and apparent, a grant of it will not be implied upon the severance of the unity of possession. Thus in the case of *Physey v. Vicary*, 16 Mees. & W. 484, the lessee of land built two houses upon it, and the whole was then released to him in fee, "with all ways, easements, advantages and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied or enjoyed." By his will he devised one house, *and the appurtenances thereunto belonging*, to B.; and the other to C. in similar terms. During the unity of ownership of A., the entrance from the high road to the principal door of the house afterwards devised to B. was by a set-out carriage drive or sweep, entering from a high road passing immediately in front of the house afterwards devised to C. to B.'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house opening only into the high road, and a back entrance to the same. After A.'s death, C. made a fence across so much of the carriage drive as passed immediately in front of his house and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. It was held by the Court of Exchequer, first, that the way, as used in A.'s time, during the unity of ownership by him, immediately in front of C.'s house, did not pass to B., with the house devised to him, under the word "appurtenances" in A.'s will; and secondly, that it did not pass as a way of necessity, whether taken in the strict sense,

or as a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had.

"*Sury v. Pigot*," said Parke, B., "distinguishes watercourses and ways of necessity from other ways and easements, which are extinguished by unity of ownership. If it is necessary to the safety of a house that water should flow down a drain, the right of watercourse through it is reserved by implication in every grant of the house. Many other cases recognize the distinction taken in *Sury v. Pigot*." "In that case," added Alderson, B., "Doddridge, J., puts the way of necessity on the same footing as a watercourse or gutter. Its principle seems to be, that nothing of absolute necessity to the tenement is extinguished by unity of ownership or possession."

It is clear also, as is laid down in the principal case, that an easement to have a fence repaired by the owner of an adjoining tenement is extinguished by unity of ownership. See also *Boyle v. Tamlyn*, 6 B. & C. 329.

Where the person during the unity of possession has altered any easements, or destroyed all external marks thereof, any purchaser from him must either take the easement subject to such alteration, or cannot claim it at all if it be destroyed. Thus it was said by Popham, C. J., in *The Lady Brown's Case*, "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct, because he thereby declares his intention and purpose, that he does not wish to enjoy them together, viz. the watercourse and the land." Palm. 446; and see *Hazard v. Robinson*, 3 Mas. Amer. Rep. 278.

Implied Grant of Easements of Necessity.

Easements of necessity are such as the law presumes from the nature of the case, inasmuch as without them the intention of the parties to the severance of the dominant and servient tenement could not be carried into effect. The rule laid down in Plowden's Commentaries, 16 a, is, "that by the grant of anything, *conceditur et id, sine quâ res ipsa haberi non potest*; as if one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away." 5 Bing. N. C. 24. So where trees were excepted by the lessor on an estate demised, it was held by the whole Court, upon an action by the lessee for trespass, that, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power *as incident* to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them." *Liford's Case*, 11 Rep. 52 a; *Darcy v. Askwith*, Hob. 234.

Upon the same principle where a grantor had excepted all mines of coal within a close, and reserved the rights of sinking and digging of pits for the winning of coal, it was held that "all things that were depending on that right, and necessary for the obtaining it," were reserved also, according to the rule in *Shephard's Touchstone*, 100; consequently, the coalowner

had, as incident thereto, the liberty to dig pits, the right to fix such machinery as would be necessary to drain the mines, and draw the coals from the pits. *Dand v. Kingscote*, 6 M. & W. 174, 196.

So likewise, "where a man having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land, and reserves the close to himself" (1 Wms. Saund. 323. See also 2 Roll. Abr. 60, pl. 17, 18; *S. C. Clark v. Cogge*, Cro. Jac. 170; *Jorden v. Atwood*, Owen, 122; *Staple v. Heydon*, 6 Mod. 3; *Packer v. Welsted*, 2 Siderfin, 39; *Dutton v. Tayler*, 2 Lutw. 1487; *Buckby v. Coles*, 5 Taunt. 311; *Pinnington v. Galland*, 9 Exch. 1), and the rule will not be varied where the close is conveyed by a man in his character of trustee, and the land surrounding it is his own, upon the principle that every deed is to be taken most strongly against the grantor, inasmuch as it was competent to the grantor when he granted the close, to grant a right of way over his own land, and that it must be presumed he intended to confer some beneficial interest by the grant, which would not be the case if the grantee had no right of way to the land. *Howton v. Frearson*, 8 T. R. 50, 56.

The rule it appears is also applicable, if the close aliened be not entirely inclosed by the land of the grantor, but partly by the land of strangers; for the grantee cannot go over the land of strangers. See 2 Roll. Abr. tit. "Graunts," Z. pl. 18, where, however, a quære is added.

Amongst others may be mentioned, as ways of necessity, "the way to church, or market," as laid down in the principal case (p. 105, ante); the right of way by the side of a navigable river (*The Queen v. The Inhabitants of Clunworth*, 6 Mod. 163; see vide *Bull v. Herbert*, 3 T. R. 253; where it is stated that it must be founded either on statute or custom), and the right of a parson to enter and take away tithes. *Payne v. Brigham*, 2 Lutw. 1313.

An easement of necessity is considered as a grant of no more than the circumstances which raise the implication of necessity require. Thus where a party entitled to a way of necessity, at a subsequent period can approach the place to which it led, by passing over his own land, his right of way over the land of another will cease; for if it were otherwise, this inconvenience might follow, that a party might retain a way over 1,000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. *Holmes v. Goring*, 2 Bing. 76, 84; and see *Lord Darcy v. Ashwith*, Hob. 234; *Wiseman v. Denham*, Palm. 341, 381; *South v. Jones*, 1 Stra. 245; *Reynolds v. Edwards*, Willes, 282; *Buckby v. Coles*, 5 Taunt. 311; *James v. Dods*, 2 C. & M. 286.

It appears that Mansfield, C. J., in *Morris v. Edgington*, 3 Taunt. 31, said that "it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the

premises could not be had." This definition of a necessary way has not been approved of, and indeed that case only decided that where there were two ways of necessity, the party requiring a way was entitled to that which was most convenient. See *Barlow v. Rhodes*, 1 Cr. & Mees. 440; *Phesey v. Vicary*, 16 Mees. & W. 484, 492, 495.

3. *Easements by Prescription.*

Time for which Enjoyment must be had.

Another mode in which an easement may be acquired is by prescription. Formerly, a title by prescription could only be acquired, to use the phrase adopted in the principal case, by enjoyment time out of mind, or, in more accurate language, by enjoyment during time whereof the memory of man runneth not to the contrary. And this time was fixed to commence with the reign of Richard the First See stat 3 Edw. 1, c. 39.

The presumption, however, of enjoyment up to so remote a period would, even before 2 & 3 Will. 4, c. 71, have been presumed by proof of an enjoyment as far back as living witnesses could speak (*Jenkins v. Harvey*, 1 Cr. M. & R. 894). A right claimed, however, by prescription, might always be disproved by showing, that it did not or could not exist at any one point of time since the commencement of legal memory; or, although it originated before the commencement of legal memory, that at some subsequent period the servient tenement and the dominant tenement once belonged to the same individual, whereby the prescriptive right was extinguished. Amidst these difficulties it became usual, for the purpose of supporting a right which had been long enjoyed, but which could be shown to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which was pleaded to have been made by some person seised in fee of the servient, to another seised in fee of the dominant tenement, and upon enjoyment being proved for twenty years, the Judges held, or rather directed juries to believe that a presumption arose, that there had been a grant made of the easement which had been subsequently lost, and consequently, that there was a good title to the easement. *Totty v. Nesbitt*, cited 3 T. R. 157; *Campbell v. Wilson*, 3 East, 294; *Mayor of Hull v. Horner*, Cowp. 102; *Holcroft v. Heal*, 1 Bos. & Pul. 400; *Fenwick v. Reed*, 5 B. & Ald. 282; 1 Real Prop. Comm. Rep. 51.

Besides the objection to its being well known that the plea of a lost grant was unfounded in fact, the object was often frustrated by proof of the title of the two tenements having been such that the fictitious grant could not have been made in the manner alleged in the plea. Ib.

The legislature, however, has since interfered by the Prescription Act, 2 & 3 Will. 4, c. 71, to shorten the period of prescription, and make possession a bar or title of itself, which was so before only by the intervention of a jury. *Bright v. Walker*, 1 Cr. M. & R. 218.

By that act (which is not applicable to Scotland or Ireland) it is amongst

other things enacted, that no claim which might be lawfully made at the common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, where the same should have been actually enjoyed by any person claiming right thereto, without interruption for *twenty years*, should be defeated by showing only the first enjoyment at any time prior to such period of twenty years, but nevertheless such claim might be defeated in any other way by which the same was then liable to be defeated; and where there should have been an enjoyment for *forty years*, the right thereto should be deemed absolute and indefeasible, unless it should appear that it took place by some consent or agreement expressly given or made for that purpose by deed or writing. Sect. 2.

That when the access and use of light to and for any dwelling-house, workshop or other building, should have been actually enjoyed therewith for *twenty years* without interruption, the right thereto should be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding; unless it should appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing. Sect. 3.

That each of the respective periods of years thereinbefore mentioned should be deemed to be the period *next before some suit or action* wherein the claim or matter to which such period relates should be brought into question, and that no act or other matter should be deemed an *interruption*, unless submitted to or acquiesced in for one year after notice thereof. Sect. 4.

In actions on the case the claimant may allege his right generally. In pleas to trespass and other pleadings, where the party used to allege his claim from time immemorial, the period mentioned in the act may be alleged; and exceptions or other matters are to be replied specially (s. 5). No presumption is to be allowed for shorter periods than are mentioned in the act as applicable. Sect. 6.

And there is a proviso, that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, is to be excluded in the computation of the periods before mentioned, except only in cases where the right or claim is thereby declared to be absolute and indefeasible. Sect. 7.

There is also a proviso, that when any land or water upon, over or from which any such way or other convenient watercourse, or use of water, shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment during the continuance of such term is to be excluded in the computation of the said period of *forty years*, in case the claim shall, within *three years* next after the end or

sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof. Sect. 8.

Before the statute it was held that as the foundation of presuming a grant against any party was, that the exercise of the adverse right on which such presumption was founded was against the party capable of making the grant, that it could not be presumed against him unless there were some probable means of his knowing what was done against him (*Daniel v. North*, 11 East, 372, 374; *Gray v. Bond*, 2 Brod. & Bing. 667); hence, if the land upon which a servitude is attempted to be imposed were in the possession of a person having a limited interest, as a termor or tenant for life, the owner or reversioner would not in general be bound by their acquiescence. Ib. See also *Arknwright v. Gell*, 5 M. & W. 203; *Barker v. Richardson*, 4 B. & Ald. 579; *Runcorn v. Doe d. Cooper*, 5 B. & C. 696; 8 Dowl. & Ry. 450.

Since the statute the enjoyment of *light*, in order to confer an easement by prescription, need not be as of right or adverse: Thus it has been held that the actual enjoyment of light for twenty years, even under a permission verbally asked for by the occupier of a house, and given by the person having a right to obstruct it, was sufficient to confer a right under the third section of the statute (*The Mayor of London v. The Pewterers' Company*, 2 Mood. & Rob. 409). That section, however, converts into a right such an enjoyment only of access of light over contiguous land, as has been had for twenty years in *the character of an easement* distinct from the enjoyment of the land itself; and the statute places this species of negative easement on the same footing in this respect as those positive easements provided for by the other sections: therefore if the dominant and servient tenement are during the prescribed period in the occupation of the same person, no right is acquired: *Harbidge v. Warwick*, 3 Exch. 552.

It will be observed that the acquisition of the easement of light is much favoured, not only inasmuch as a less time confers an *indefeasible* right, but the proviso in the seventh section, which excludes the time when a person otherwise capable of objecting is an infant, idiot, non compos, *femè covert* or tenant for life, from other periods of computation, includes it in this; and therefore, if there be an actual enjoyment of light for twenty years, such as the third section contemplates, a right is gained, though the owner of the adjoining property be the occupier, and be for the whole period under disability to grant (per Parke, B., in *Harbidge v. Warwick*, 3 Exch. 556). The mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within the third section. *Plasterers' Company v. Parish Clerks' Company*, 6 Exch. 3.

With regard to *other easements than that of light*, as, for instance, a right of way, in order to bring it within the second section of the act, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so "as of right," for that is the form in which by section five such a claim must be pleaded (*Holford v. Hankinson*, 5 Q. B.

584; *Clay v. Thackray*, 9 Car. & P. 47; 2 Moo. & Rob. 244); and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done, if he shall have occasionally asked the permission of the occupier of the land no title would be acquired, because it was not enjoyed "as of right." *Tickle v. Brown*, 4 Ad. & Ell. 382. For the same reason it would not, if there had been unity of possession during all or part of the time, for then the claimant would not have enjoyed "as of right" the easement, but the soil itself (*Onley v. Gardiner*, 4 Mees. & W. 496; *Clay v. Thackray*, 9 Car. & P. 47). So it must have been enjoyed "without interruption." And as to what constitutes an interruption within the meaning of the act, see *Carr v. Foster*, 3 Q. B. 581; 2 Gale & Dav. 752; *Ward v. Ward*, 21 L. J., Exch., 334; *Payne v. Shedden*, 1 M. & Rob. 382; *Parker v. Mitchell*, 11 Ad. & Ell. 788; 3 P. & D. 655; *Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & D. 442; 8 C. & F. 311; *Eaton v. Swansea Waterworks Company*, 20 L. J., Q. B., 482; *Davies v. Williams*, 20 L. J., Q. B., 330; *Hall v. Swift*, 4 Bing. N. C. 381; 6 Scott, 167; *Lowe v. Carpenter*, 6 Exch. 825.

The claim to an easement may be defeated in any other way by which the same was liable to be defeated before the statute; that is, by the same means by which a similar claim, arising by custom, prescription or grant, would have been defeasible before the statute: and therefore, it may be answered by proof of a grant, or of a licence, written or parol, for a *limited period*, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time it was exercised. *Bright v. Walker*, 1 Cr. M. & R. 211, 219. See also *The Monmouthshire Canal Company v. Harford*, 4 Ad. & Ell. 369; *Tickle v. Brown*, 1 Cr. M. & R. 614.

The enjoyment of an easement as of right for twenty years before the commencement of the suit, within the statute means a *continuous* enjoyment as of right for that period, of the easement as an easement without interruption acquiesced in for a year. "To hold," said Parke, B., "that the words of the fourth section might be satisfied by an enjoyment for different intervals, which added together would be twenty years, the last continuing up to the commencement of the suit, would be to let in a great number of cases in which a presumption of a grant never could have existed before the statute. For instance, if the occupier had used the road openly for a year or two, and then uniformly asked permission on each occasion, or used it secretly and by stealth for some years, and then resumed the enjoyment of it, no one would contend that a grant could have been presumed, because the intervals of enjoyment united might amount to twenty years. A similar reason applies to intervals of unity of possession, during which there is no one who could complain of the user of the road" (*Onley v. Gardiner*, 4 Mees. & W. 496, 500). In fact the whole purview of the statute shows, that it applies

only to such rights as would before the act have been acquired by presumption of a grant from long user. *Arkwright v. Gell*, 5 Mees. & W. 203, 233.

If an enjoyment for twenty years do not give a good title *against all*, it will give no valid title *at all* to an easement. Thus where a way had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee under a lease for lives granted by the Bishop of Worcester, and it was held that this user gave no right as against the bishop, and did not affect the see, inasmuch as under the 8th section of the act he might have disputed the right at any time within three years after the expiration of the lease, it was also held, that as the user could not give a title as against *all persons* having estates in the locus in quo, it gave no title as against the lessee and those claiming under him, and that no title was gained by an user which did not give a valid title as against the bishop, and permanently affect the see. *Bright v. Walker*, 1 Cr. M. & R. 211; 4 Tyr. 502.

Where the right has been exercised for forty years, under the 2nd section, as of right and without interruption, it will be indefeasible, unless enjoyed by some consent or agreement, and the necessity for its being in writing only exists where the agreement is entered into prior to the forty or twenty years' enjoyment; and where an agreement is made *within* the particular period of forty or twenty years, it may be given in evidence although by parol. *Tickle v. Brown*, 6 Nev. & Man. 230; 4 Ad. & Ell. 360. See also *Beasley v. Clarke*, 2 Bing. N. C. 705; 3 Scott, 258.

A right claimed by the inhabitants of a township to enter upon the land of a private person and take water from a well therein for domestic purposes is an easement and not a profit à prendre, and may therefore properly be claimed by custom (*Race v. Ward*, 24 L. J., Q. B., 153); but a similar claim of a right of fishing being a profit à prendre is bad. *Bland v. Lipscombe*, 1b. 155, n.

It may be here mentioned, that the easement of having a certain prospect cannot be acquired by implied grant or by prescription (*Attorney-General v. Doughty*, 2 Ves. 453), although it may be by express grant or covenant. *Aldred's Case*, 9 Rep. 58 b; *Squire v. Campbell*, 1 My. & Cr. 459.

How particular Easements are acquired by Prescription.

Right to Water.

The right to water running in its natural course, seems to arise as much ex jure naturæ as from what is termed prescription. To use the words of Doddridge, J., in the principal case, "water naturally descends, and is always current, et aut invenit aut facit viam."

The right to running water may be claimed by that rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors and is well established, each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same where he pleases for any purposes of his own not inconsistent with a similar right in the pro-

prietors of the land above and below; so that neither the proprietor above can diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without his licence or grant. See *Mason v. Hill*, 5 B. & Ad. 17; 2 Nev. & M. 747; *Wright v. Howard*, 1 S. & S. 190.

The superior riparian proprietors may use a stream for all reasonable purposes while in their land, provided they send it on without material diminution or alteration to inferior proprietors. *Embrey v. Owen*, 6 Exch. 353.

The right of a riparian proprietor *ex jure nature* to use flowing water can be only materially diminished or interfered with by an easement in another person, either by grant or prescription, to use it in a manner inconsistent with its usual course, and a single act of appropriation of benefit by any riparian proprietor, although it will not confer an easement, will be sufficient to give him a right to insist that no act shall be done by any other proprietor which will interfere with such enjoyment (*Bealey v. Sham*, 6 East, 208; *Williams v. Morland*, 2 B. & C. 910; 4 Dowl. & Ry. 583). And it will be no answer to the action that the defendant first appropriated the water to his own use, unless he can show a title to do so, either by grant or prescription (*Mason v. Hill*, 3 B. & Ad. 304; 2 Nev. & M. 747). For instance, if a man erected a new mill upon a stream, a superior riparian proprietor could not by any means divert the water so as to interfere with the beneficial working of the mill save by grant or prescription, and *pari ratione* the person erecting the mill would acquire no right as against inferior riparian proprietors save by grant or prescription. See *Cox v. Mathews*, 1 Vent. 237; *Luttrell's Case*, 4 Co. 86; *Prescott v. Phillips*, cited 6 East, 213; *Saunders v. Newman*, 1 B. & Ald. 258; and see and consider particularly the Leading Case of *Mason v. Hill*, 5 B. & Ad. 1, where all the authorities are examined by Lord Denman with great learning and accuracy.

Although, however, an act of appropriation may be useful in order to show that damage has been sustained by the diversion of water from its natural course, it is by no means clear, as observed by Lord Denman in *Mason v. Hill*, 5 B. & Ad. 27, that an occupier of land may not recover for the loss of the general benefit of the water, without a *special use* or *special damage* shown. See also *Palmer v. Kebblethwaite*, 1 Show. 64; *Glynne v. Nichols*, 2 Show. 507. It would, however, clearly be sufficient to show generally "a deterioration of the value of the premises." 2 B. & C. 916, per Holroyd, J.; and see *Fay v. Prentice*, 1 C. B. 828; *Williams v. Mostyn*, 4 Mees. & W. 153; *Embrey v. Owen*, 6 Exch. 353, 368.

It seems, however, that the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is not governed by the same rule of law as that which applies to and regulates a watercourse flowing on the surface. Thus it has been held, that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains

away the water from the land of the first-mentioned owner, and lays his well dry. See *Acton v. Blundell*, 2 Mees. & W. 324, in which Tindal, C. J., in his elaborate judgment, after observing that no case had been cited on either side bearing directly on the subject in dispute, observed, "The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendant; of some others the opinion is expressed with more obscurity. Digest, lib. 39, tit. 3. De aquâ et aquæ pluvie arcendæ. s. 12. 'Denique Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi, nec de dolo actionem et sanè non debet habere, si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit.'" See also *Hammond v. Hall*, 10 Sim. 551.

A person may acquire a right by prescription to discharge water, either in a pure state or rendered noxious from the precipitation of minerals, by an artificial channel upon or through the land of a neighbour (*Saunders v. Newman*, 1 B. & Ald. 258; *Wright v. Williams*, 1 Mees. & W. 77). So likewise to discharge water through a pipe (*Lady Brown's Case*, cited ante, 112), or from eaves (*Thomas v. Thomas*, 2 Cr. M. & R. 34) on the ground of a neighbour.

The user of an artificial channel of a temporary character by the owner of the dominant tenement, for his own convenience, by which he discharges water through the land of the owner of the servient tenement, will not confer an easement upon the latter by which he can compel the owner of the dominant tenement to discharge the water along the artificial channel, and, consequently, he may discontinue to do so when he pleases. See *Arkwright v. Gell*, 5 Mees. & W. 203, in which case mills had been erected by the owner of the servient tenement by the side of a sough or level, by means of which the owner of the dominant tenement had drained his mines: it was held by the Court of Exchequer that twenty years user of the water for the purposes of the mills did not give the latter a right to the discharge of the water, either from the presumption of a grant or by force of the statute (2 & 3 Will. 4, c. 71, s. 2). "The stream," said Lord Abinger, C. B., "upon which the mills were constructed was not a natural watercourse, to the advantage of which, flowing in its natural course, the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason v. Hill*, 5 B. & Ad. 1, and in other cases. This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine-owners required it; and, in the ordinary course, it would, most probably, cease when the mineral ore above its level should have been exhausted. . . . At common law, independently of 2 & 3 Will. 4, c. 71, an user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would, in truth, be neither more nor less than

an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep the mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine owners could have meant to burden themselves with such a servitude, so destructive to their interests. And what is there to raise an inference of such an intention? The mine owner could not bring any action against the person using the stream of water, so that the omission to bring an action could afford no argument in favour of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the water entirely; a course so expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle applied to the case of lights, to infer, from the abstinence from such an act, an intention to grant the use of the water in perpetuity as a matter of right.

“Several instances were put in the course of the argument of cases analogous to the present, in which it could not be contended for a moment that any right was acquired. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years: is it possible, from the fact of such user, to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burden himself and the assigns of his mine with the obligation to keep a steam-engine for ever for the benefit of the landowner?

“Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Certainly not. In all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin. . . . The user, even for a much longer period than twenty years, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

“It remains to be considered, whether the statute 2 & 3 Will. 4, c. 71, gives the owner of the mills any such right; and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such rights as would, before the act, have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods ‘*without interruption*;

and, therefore, necessarily imparts such an user as could be *interrupted* by some ‘one capable of resisting the claim;’ and it also requires to be ‘of right.’ But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the sough, and was incapable of inter-

ruption by them at any time during the whole period by any reasonable mode; and as against them it was not 'of right.' They had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it." See also *Wood v. Waud*, 3 Exch. 748. So in *Greatrex v. Hayward*, 8 Exch. 291, it was held, that the flow of water from a drain made for the purposes of agricultural improvements did not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land. "Take," said Alderson, B., "the case of a farmer, who, under the old system of farming, has allowed the liquid manure from his fold-yard to run into a pit in his neighbour's field; but, upon finding that the manure can be beneficially applied to his own land, has stopped the flow of it into his neighbour's pit and converted it to his own use. Could it be contended that the fact of his neighbour having used this manure for upwards of twenty years, would give the latter the right of requiring its continuance?"

The case of *Magor v. Chadwick*, 11 Ad. & Ell. 571, might at first sight seem to be at variance with these authorities. There the owners of a mine had made an adit through their lands to drain the mine, which they afterwards ceased to work; and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had, during that time, used it for brewing. It was held by the Court of Queen's Bench that he had thereby gained a right to the undisturbed enjoyment of the water, at any rate as against the defendants, who were the owners of *other* mines, who were not shown to be connected with, or to claim under, the owners of the adit and old mine; and that, consequently, they could not use the adit for the purpose of draining their mines, by which the water was rendered foul and unfit for brewing. Pollock, C. B., with reference to this case, as distinguished from *Arkwright v. Gell*, has observed "that the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; but what is more important, the action was not brought for abstracting, but for fouling the water, a species of injury which does not stand on the same footing; for though the possessor of the mine might stop the stream, it does not follow that he or any other could pollute it whilst it continued to run." *Wood v. Waud*, 3 Exch. 777.

Right to Light and Air.

The person who builds the house is only entitled to the light above his house according to the maxim, "*Cujus est solum ejus est usque ad cælum et ad inferos*," and is not entitled of common right to the lateral passage of light. This he can only claim as an easement, and not by a single act of appropriation. Where, therefore, a person builds upon the furthest extremity of

his own land, with windows opening towards his neighbour's land, although the latter cannot complain that his privacy is thereby violated, he may at any time within twenty years, by building or otherwise upon his own land, obstruct the windows so as to prevent the acquisition of an easement (*Chandler v. Thompson*, 3 Camp. 82; *Moore v. Rawson*, 3 B. & C. 340). After the expiration of that period, both before (*Moore v. Rawson*, 3 B. & C. 340) and since the 2 & 3 Will. 4, c. 71 (see ante, pp. 115, 116), he will acquire a right to the light by prescription.

The extent of the right to light depends upon the amount which has been used during the period which has gained a right by prescription. See *Martin v. Goble*, 1 Camp. 322; *Roberts v. Macord*, 1 Moo. & Rob. 230.

By the custom of London, a building might be raised upon the old foundation to any height, although ancient windows or lights in the next house were stopped, if there were no agreement in writing restrictive of the custom. Com. Dig. London, N (5); *Winstanley v. Lee*, 2 Swanst. 339. See however, now, 2 & 3 Will. 4, c. 71, s. 3; *Salter's Co. v. Jay*, 3 Q. B. 109.

A right to a prospect can be acquired only by grant or covenant, and not by prescription. *Attorney-General v. Doughty*, 2 Ves. 453.

It seems that a person may by prescription acquire an easement, so as to prevent another person making any erection, on his own ground, so as to prevent the wind from having access to a windmill. See Vin. Abr. "Nusance," G, pl. 11; 2 Roll. Abr. 704, pl. 23.

Rights of Way.

Rights of way being of various kinds, often for limited purposes, as a foot-way, a horse-way, a carriage-way; sometimes for particular articles only, as for agricultural produce only (*Jackson v. Stacey*, Holt's N. P. 455), the carriage of water only (*Knight v. Woore*, cited 5 Bing. N. C. 625), or coal only (*Iveson v. Moore*, Ld. Raym. 486; 1 Salk. 15), or for all articles except coal (*Marquis of Stafford v. Coyney*, 7 B. & C. 257); it is clear that no greater or any different servitude can be imposed upon the owner of the servient tenement. In the case of a grant, the grant itself (*Brunton v. Hall*, 1 G. & D. 207), in the case of prescription, the usage of the owner of the dominant tenement (*Cowling v. Higginson*, 4 Mees. & W. 245), will be the test for determining the extent of his right. In the Roman law a superior right of way included within itself those of an inferior class, see I. ff. de Serv. præd. (Lib. 2, tit. 3), where it is said "Iter est jus eundi ambulandi hominis, non etiam jumentum agendi vel vehiculum. Actus est jus agendi vel jumentum vel vehiculum. Ita qui iter habet actum non habet; qui actum habet, et iter habet, (coque uti potest,) etiam sine jumento. Via est jus eundi et agendi et ambulandi; nam et iter et actum via in se continet." This seems scarcely to be the case with the English law, although it may be matter for the consideration of a jury. Thus evidence of a prescriptive right of way for all manner of carriages does not

necessarily prove a right of way for all manner of cattle, though it may be evidence of a drift-way, for the jury to consider together with other evidence (*Ballard v. Dyson*, 1 Taunt. 279). "I have always," said Mansfield, C. J., "considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way. Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way to it, which would be used with very little, if any, inconvenience to himself; yet there it would be a monstrous inference to conclude, that if a butcher could establish a slaughter-house at the inner end of the mews, without being indictable for a nuisance, he might therefore drive horned cattle to it, which would be an intolerable annoyance to the grantor. So cases may exist of a grant of land, where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor; but it does not follow that cattle may be driven there." See also *Cowling v. Higginson*, 4 Mees. & W. 245; *Higham v. Rabett*, 5 Bing. N. C. 622; *Brunton v. Hall*, 1 Gale & Dav. 207; *Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 963.

Right to natural Support to Land.

It seems that a person has an easement to the lateral support of his own soil, by the soil of his neighbour, and that if the latter were to dig his own land so that the land of the former were to fall in, he would be liable to an action (*Wilde v. Minsterley*, 2 Roll. Abr. 564, Trespass, Justification, I. pl. 1).

So where a person aliens land, reserving to himself the power of getting the minerals below, upon the terms of making compensation for entering on the lands and doing the necessary acts, he is not under such a reservation intitled to take away all the minerals, but only so much as he can get, leaving a reasonable support to the surface. *Harris v. Ryding*, 5 Mees. & W. 60.

Right of Support to Buildings from adjacent Land.

Where, however, a person builds to the utmost extremity of his own land, and thereby increases the lateral pressure on the soil of his neighbour, if the latter digs his own ground, so as to remove some part of the soil, which formed the support of the building so erected, an action will not lie for the injury thereby occasioned, if the house be of recent erection (*Wilde v. Minsterley*, 2 Roll. Abr. 564, Trespass, Justification, I. pl. 1;

Wyatt v. Harrison, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220), unless he has by grant or prescription acquired a right to the support of the house by the soil of his neighbour. Thus in *Stansell v. Jollard*, 1 Selw. N. P. 457, 11th Ed., which was an action on the case for digging so near to the gable-end of the house of the plaintiff, let to a tenant, that it fell; Lord Ellenborough held, that where, as in the case before the Court, a man had built to the extremity of his soil, and had enjoyed his building *above twenty years*, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support; but that it was otherwise of a house newly built. See also *Slingsby v. Barnard*, 1 Roll. Rep. 430; *Dodd v. Holme*, 1 Ad. & Ell. 493, 505; *Gayford v. Nicholls*, 2 Com. L. Rep. 1066; *Nichlin v. Williams*, 10 Exch. 259.

Right of Support to Buildings by Buildings.

Where two persons build or have houses in close juxtaposition one with another, it appears, that unless there has been a grant of the right to support one house against the other (*Brown v. Windsor*, 1 Cr. & J. 20), such easement will not be presumed to exist even in the case of ancient houses. Thus in *Peyton v. The Mayor of London*, 9 B. & C. 725, which was a special action upon the case brought by the plaintiffs as reversioners of a house in Cheapside, in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for pulling it down, without shoring up the plaintiff's house, in consequence whereof it fell down; it was held, by the Court of King's Bench, first, that upon the declaration the plaintiffs could not recover on the ground that the defendants had not given notice that they were about to pull down their house, that not being alleged as a cause of injury; and, secondly, that as the plaintiffs had not alleged or proved any right to have their house supported by the defendants, they were bound to protect themselves by shoring, and could not complain that the defendants had to do so.

It has indeed been held, that if the pulling down of a house be irregularly and improperly done, and injury produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought to have done for his own protection, as by shoring up his house. See *Walters v. Pfeil*, Mood. & Malk. 362.

The mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention to the owner of an adjoining wall; nor, if he be ignorant of the existence of the adjoining wall, as where it is underground, is he bound to use extraordinary caution in pulling down his own, *Chadwick v. Trower*, 6 Bing. N. C. 1; 8 Scott, 1, in the Court of Exchequer Chamber, reversing the decision of the Court of Common Pleas (3 Bing. N. C. 334; *S. C.* 3 Scott, 699); a fortiori, if a person gives notice of his intention to pull down his own buildings, he is not bound to use more than reasonable and ordinary care in doing so, nor to secure the adjoining buildings from injury. *Massey v. Goyder*, 4 Car. & P. 161.

Where several houses belonging to the same owner are built together, so that each requires the mutual support of the neighbouring house, and the owner parts with one of the houses, the right to such mutual support is not thereby lost; the legal presumption being, that the owner reserves to himself such right, and, at the same time, grants to the new owner an equal right; and consequently, if the owner parts with several of the houses at different times, the possessors still enjoy the right to mutual support, the right being wholly independent of the question of the priority of their titles. *Richards v. Rose*, 9 Exch. 218.

Fences and Party-Walls.

It seems that there may be an easement, by which the owner of the servient tenement is bound to maintain a fence (*Dyer*, 295, ante, 108); but it is clear as laid down by Whitelocke, C. J., in the principal case, that where the adjoining closes, which have once belonged to different persons, one of whom was bound to repair the fences, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety, afterwards parts with one of the two closes, the obligation will not be revived, unless express words be introduced into the deed of conveyance for that purpose. See *Boyle v. Tamlyn*, 6 B. & C. 329, 337.

As to party-walls, see *Matts v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 B. & C. 257; *Bradbee v. Christ's Hospital*, 4 Man. & Gr. 714, 761.

Legalization of Nuisances.

A person may, in the exercise of his trade or business, by prescription claim the easement of transmitting from his own land to that of his neighbour 2 Bing. N. C. 137; 5 Scott, 506), either smoke or offensive noises, smells or vapours, which might otherwise be actionable as nuisances. Vin. Abr. "Nuisance," G; Selw. N. P. 1118, 11th Ed.

It will be no justification, that the nuisance complained of existed before the plaintiff came into the neighbourhood, and that he in fact came to it, for in all cases a user for twenty years must be shown. See *Elliotson v. Feetham*, 2 Bing. N. C. 134; and *Bliss v. Hall*, 5 Scott, 500, where to a declaration against the plaintiff for a nuisance in carrying on the business of a candle manufacturer, in messuages contiguous to the plaintiff's messuage, the defendant pleaded that he was possessed of his messuages, and carried on his business therein for the space of three years before the plaintiff became possessed of his messuage. It was held, by the Court of Common Pleas, on a general demurrer, that the declaration was bad, inasmuch as to legalize the nuisance, a twenty years' user must be averred and proved.

"It clearly is not enough," said Bosanquet, J., "in such a case as this, for the defendant to show a short possession and exercise of the offensive trade, anterior to the commencement of the plaintiff's possession. Nothing less than twenty years user will afford a defence."

III. *Incidents of Easements.*

Obligation to Repair.

The owner of the dominant tenement, as the easement is for his benefit, is bound to do all necessary repairs, and not the owner of the servient tenement; as, for instance, the scouring out of a watercourse (Bract. lib. 4, fol. 222; *Peter v. Daniel*, 5 C. B. 568), or the reparation of a way (Com. Dig. "Chimin," (D 6); *Pomfret v. Ricroft*, 1 Wms. Saund. 322 a; *Taylor v. Whitehead*, 2 Doug. 745; *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109; *Bullard v. Harrison*, 4 Mau. & S. 387; *Duncan v. Louch*, 6 Q. B. 909), and he has a right to do all things necessary in order to make the repairs, as to enter upon and dig the land on the servient tenement (9 Edw. 4, 35; *Pomfret v. Ricroft*, 1 Wms. Saund. 322 e); the owner, however, of the servient tenement may be bound, either by express stipulation or prescription, to make all repairs (*Taylor v. Whitehead*, 2 Dougl. 749; *Rider v. Smith*, 3 T. R. 766). If a way becomes impassable through want of repairs which ought to have been done by the owner of the land, the owner of the dominant tenement may, it seems, justify his trespass by deviating from the ordinary track (*Anon.*, cited, Sir W. Jones, 296); secus, where it is his own duty to make the repairs. *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 Mau. & S. 387.

Where an easement exists, by which a person is entitled to support or cover from the property of another, as in the case of a house where two different floors belong to different persons (5 Mees. & W. 71), it seems that, except in the case of a custom (Fitz. Nat. Brev. 127, F; Keilw. 98 b), or contract (5 Mees. & W. 71), the owner of the dominant tenement has no right to compel the owner of the servient tenement to repair. *Tenant v. Goldwin*, 1 Salk. 360; 2 Ld. Raym. 1089; and see 1 Wms. Saund. 322, 322 a.

Extent and Mode of Enjoyment.

As a general rule a person having a right to an easement may use it in such manner as is necessary for its most commodious enjoyment. Thus under a general grant of a free and convenient way for the purpose of carrying coals, it was held, that the grantee had a right to lay a framed waggon-way, although such ways were not in use at the time of the grant. "The question," said Ashurst, J., "is whether under this general grant for the purpose of carrying coals the grantee has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom where they have not those framed waggon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore under the original grant, he has a right to make a framed waggon-way along the slip of land in question, which is necessary for the purpose of carrying his coals; it being in the contemplation of the parties at the time of making this grant.

Senhouse v. Christian, 1 T. R. 560—569. And it seems that under a reservation of "a sufficient way-leave" to a coal-pit, the right would not be confined to such ways as were in use at the time of the grant, and that the coalowner might have a right to make a railway for the purpose of carrying the coals from the mines for shipment. *Dand v. Kingscote*, 6 Mees. & W. 174; see also *Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 109; *Duncombe v. Randall*, Hetley, 34; *Brown v. Best*, 1 Wils. 174; *Weld v. Hornby*, 7 East. 195.

The owner, however, of the dominant tenement must not use his right, so as to produce inconvenience or injury to the owner of the servient tenement (*Gerrard v. Cooke*, 2 Bos. & Pul. N. R. 115; nor must he extend his enjoyment thereof in such a manner as to increase the burden or restriction placed by it on the servient tenement. Thus under a right of way over a close to a particular place, a person cannot justify going beyond that place. See *Ward v. Lawton*, 1 Ld. Raym. 75, where Powell, J., laid down the distinction that, where the owner of the dominant tenement went farther than his own close to a mill or bridge, he might well do so, but he could not go to another close of his own, "for by the same reason, if he purchased a thousand closes he might go to them all, which would be very prejudicial to the owner of the servient tenement." See also *Hodder v. Holman*, Roll. Abr. "Chimin Private," A, pl. 1; *Saunders v. Mose*, Ib. pl. 2, 3; *Stott v. Stott*, 16 East, 343.

So, likewise, neither a way (*Senhouse v. Christian*, 1 T. R. 560; *Conling v. Higginson*, 4 M. & W. 245; *Dand v. Kingscote*, 6 M. & W. 174) nor a watercourse can be diverted into a direction not contemplated by the grant or reservation. *Northam v. Hurley*, 1 Ell. & Bl. 665.

So if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases. Per Parke, B., in *Henning v. Burnet*, 8 Exch. 192; and see *Allan v. Gomme*, 11 Ad. & Ell. 759.

In *Henning v. Burnet*, 8 Exch. 187, the plaintiff being the owner in fee of some land partly built upon, conveyed to the defendant a dwelling-house with coach-house and stable at the back thereof, and a field, together with all ways, easements, &c., to the dwelling-house and field belonging, or usually enjoyed therewith, with free liberty of ingress, egress and regress, for the defendant, with cattle and carriages, over the carriage-way and footpath leading to the said dwelling-houses, coach-houses and stables, in the occupation of F. N. and the defendant. Previous to the time of this conveyance, a private road was used for carriages and cattle from the turnpike road to the defendant's coach-house and stable and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road, near their former site (inclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage-road, which he used instead of the former gate, and drove carriages and cattle along the road into the field and back again. It

was held by the Court of Exchequer, that the defendant was liable in trespass, inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith, extended only to the user of the way as it existed at the time of the grant, through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house and stable only.

As to the effect of alterations in the dominant tenement on an easement, see post, p. 181.

The owner of the servient tenement must do no act which will interfere with the rights of the owner of the dominant tenement, as by obstructing a way (2 Roll. Abr. "Nusans," G, pl. 1), or a stream (*Bower v. Hill*, 1 Bing. N. C. 555). And it seems that the growth of the roots and branches of trees standing on the soil of the servient tenement, so as to obstruct a watercourse, may be considered the act of the owner. *Hall v. Swift*, 6 Scott, 167.

IV. *Disturbance of Easements, and the Remedies in respect thereof.*

Where there is a disturbance in the enjoyment of an easement, as for instance, by the owner of the servient tenement making buildings or erections on his own soil, or otherwise stopping up a watercourse, or a way, or obstructing ancient lights, the owner of the dominant tenement may either proceed at law, or enter upon the land on which the nuisance exists, and at once abate it (Bro. Abr. "Nusans," 105 b, pl. 33; 8 Ed. 4, 5; 2 Roll. Abr. "Nusans," (S), (W); *Wigford v. Gill*, Cro. Eliz. 269; *Rex v. Roswell*, Salk. 459; *Raihes v. Townsend*, 2 Smith, 9), nor is any request to the owner of the servient tenement to abate the nuisance requisite, except when he has become the owner, after the erection of the nuisance. *Penruddock's Case*, 5 Co. 100 b.

The party disturbed in an easement may also take proceedings and obtain an injunction in equity, if his right be clear, and the injury which he would sustain, without its interference, would not be compensated by the damages which he might obtain in a Court of Law. See *Drewry on Injunct.* 237.

V. *The Extinguishment of Easements.*

An easement may be extinguished—1. By express release under seal; 2. By act of parliament, as the General Inclosure Act, 41 Geo. 3, c. 109, s. 8, having the same operation as a release (and upon these modes of extinguishment it will be unnecessary to say anything further); 3. By merger in consequence of the unity of seisin or ownership of the dominant and servient tenement; 4. By the licence from the owner of the dominant tenement to do some act which of necessity destroys the easement; 5. By the abandonment of the enjoyment by non-user.

Extinguishment of Easement by Unity of Possession.

Where there is a unity of seisin or ownership of the dominant and servient tenement, from which possession will be implied, as we have before shown,

the easement will be extinguished (ante, p. 111), although, on a severance of the property, a grant of those easements which are continuous and apparent, or which are of necessity, will be implied. Ante, p. 110.

So the owner may on a severance revive an easement by an express grant, but this may more properly be called a new easement.

But where the estates in the dominant and servient tenement are not perdurable, merger or extinguishment will not take place, there will be merely a suspension of the easement during the unity of possession. "If," observes Alderson, B. "I am seised of freehold premises, and possessed of leasehold premises adjoining, and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin, and if I part with the premises, the right, not being extinguished, will revive." *Thomas v. Thomas*, 1 Cr. M. & R. 41; see also *Rex v. The Inhabitants of Hermitage*, Carth. 239; *Canham v. Fisk*, 2 Cr. & J. 126.

Extinguishment of Necessity, by leave of the Owner of the Dominant Tenement.

Where the owner of the dominant tenement authorizes the owner of the servient tenement, although only by parol, to do some act thereon, the effect of which will be to prevent the future enjoyment of the easement, it will be extinguished. See ante, p. 110, and *Liggins v. Inge*, 7 Bing. 682; *Webb v. Paternoster*, Palm. 71; 2 Roll. Rep. 152; *Winter v. Brockwell*, 8 East, 308.

Extinguishment by Abandonment or Non-user.

An easement will be extinguished by a voluntary abandonment or cessation to enjoy it. As where a person having a mill, pulls it down with the intention of not returning, the owner of the adjoining land might, it is presumed, erect a mill and employ the water so relinquished, and would not be compellable to pull down his mill, if the owner of the former should afterwards change his determination, and wish to rebuild his own. See dictum of Tindal, C. J., in *Liggins v. Inge*, 7 Bing. 693; *Luttrell's Case*, 4 Co. 86. Upon the same principle it has been held that where an ancient window had been shut up for twenty years with brick and mortar, it lost its privilege as an easement, and was as if it had never existed. *Lawrence v. Obee*, 3 Camp. 514.

So in *Moore v. Rawson*, 3 B. & C. 332, the plaintiff's messuage was an ancient house, having had formerly adjoining to it a building, in which there was an ancient window, next the lands of the defendant; a former owner of the plaintiff's premises, about seventeen years before, had pulled down that building, and erected on its site another with a blank wall, next adjoining the premises of the defendant, who, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff,

who then opened a window in that wall in the same place where the ancient window had been in the old building; it was held by the Court of King's Bench, that he could not maintain any action against the defendant for obstructing the new window, because by erecting the blank wall, he not only ceased to enjoy the light, but had evinced an intention never to resume the enjoyment.

A mere temporary abandonment of the enjoyment of an easement will not destroy the right, but the onus lies upon the party discontinuing the enjoyment, of showing that he intended to resume it within a reasonable period. If, for instance, in the case of *Moore v. Rawson*, the person who had pulled down the old house had shown an intention to rebuild it in the same manner, within a reasonable time, and not an entirely different one with a blank wall, he would not have destroyed his right (see 3 B. & C. 337, 338). In *Hale v. Oldroyd*, 14 M. & W. 789, the plaintiff had enjoyed an immemorial right to the flow of water into an ancient pond in one of his closes, but above thirty years before, he made a new pond in three different closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate under 2 & 3 Will. 4, c. 71, s. 7, it was held by the Court of Exchequer, that the plaintiff was entitled to recover in respect of his right to the flow of water to the old pond. "The use of the old pond," said Parke, B., "was discontinued only because the plaintiff obtained the same or greater advantage from the use of the three new ones. He did not thereby abandon his right, he only exercised it in a different spot, and a substitution of that nature is not an abandonment."

With regard to easements of an intermittent nature;—although the law has not fixed any period of prescription for them, it appears at one time to have been thought that as a grant would be presumed after twenty years' user, so a release would be presumed after non-user for the same period. That if, for instance, A. had ceased to use a right of way over B.'s land for twenty years, a presumption would arise that he had released such right of way (*Doe v. Hilder*, 2 B. & Ald. 791; *Moore v. Rawson*, 3 B. & C. 339). It has, however, been recently held, that the mere non-user of a right of way even for more than twenty years will not raise a presumption of abandonment. See *Ward v. Ward*, 7 Exch. 838. There the defendant, who was the owner of a close called Stubbing Pits, had ceased to use a way over the plaintiff's ground (to which he had an immemorial right) from the year 1814 to 1852, by reason of his having had during that period a more convenient way. It was held by the Court of Exchequer, that the defendant had not, by mere non-user, lost his right of way. "The presumption of abandonment," said Alderson, B., "cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by *adverse* enjoyment. The non-user, therefore, must be the consequence of something which is adverse

to the user. Here the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property. If the owner of that close were now precluded from recovering the original right, he would be without the means of any access to his property."

Where Alterations in the Dominant Tenement extinguish an Easement.

Where there has not been an abandonment of an easement, but mere alterations have been made in the dominant tenement, as to the mode of enjoying it, questions of difficulty arise as to what effect they have upon the easement. It seems as a general rule, that the owner of the dominant tenement cannot impose any additional restriction or burden upon the owner of the servient tenement. If, however, the additional restriction or burden can be ascertained, and separated from the easement, it will still remain unimpaired.

Thus "if a party having a right of footway were to use it for other purposes, although he might be liable to an action for trespass, he might, nevertheless, sustain an action for any disturbance of his footway; the right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement." Gale, 362.

Where, however, the alterations made in the dominant tenement, imposing additional restrictions or burdens upon the servient tenement, cannot be separated from the original easement, it will be lost. Thus in the case of *Blanchard v. Bridges*, 4 Ad. & Ell. 176; S. C. 5 Nev. & Man. 567, where the owner of a house enlarged it, and inserted a window at one end, in the part added, and, at another end, carried out the side walls (between which two windows formerly stood in a straight line) five feet, converting this end into a bow, and inserting two bow-windows in the same direction, but not in the same situation, as the two former: it was held by the Court of King's Bench, that, whatever privilege against the obstruction of light the windows of the original house possessed, this privilege did not apply to the three new windows. "If," said Patteson, J., "it were once admitted that a new window, varying in size, elevation or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented if it had become a question in the first instance." See also *Cherrington v. Abney*, 2 Vern. 646.

But where an alteration has been made in lights, as by the enlargement of an old window (*Chandler v. Thompson*, 3 Camp. 80), or the conversion of one building into another, as a malt-house into a dwelling-house (*Martin*

v. *Goble*, 1 Camp. 322), it seems that the easement of light and air will not be thereby lost; inasmuch as the owner of the dominant tenement will be entitled to enjoy it, in the same degree as theretofore. See also *Garritt v. Sharp*, 3 Ad. & Ell. 325; *S. C.* 4 Nev. & Man. 834.

Where an alteration in the dominant tenement does not impose any additional burden or restriction on the servient tenement, the easements will remain. Thus a person will not lose the easement of water, by converting a fulling mill into a mill to grind corn (*Luttrel's Case*, 4 Rep. 87), nor by altering the dimensions of the mill-wheel (*Saunders v. Newman*, 1 B. & Ald. 258), nor by making straight a watercourse, which flowed in a crooked way along a road. *Hall v. Swift*, 6 Scott, 167.

FOX v. THE BISHOP OF CHESTER (a).

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In the House of Lords, June 3rd (in Error).

[REPORTED, 6 BING. 1.]

ADVOWSON—NEXT PRESENTATION—SIMONY.]—*The sale of a next presentation, the incumbent being in extremis, within the knowledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony.*

THIS was a writ of error, brought by the plaintiff below, from a judgment of the Court of King's Bench at Westminster, affirming a judgment of the Court of Great Sessions at Chester, on a special verdict in a quare impedit commenced in the latter Court.

The first count of the declaration stated that the advowson of the rectory of the church of Wilmslow was appurtenant to the manor of Bollyn; and set out the title of Thomas J. Trafford for life thereto; that T. J. Trafford, by Indenture, dated 12th November, 1819, granted unto the plaintiff, his executors, &c., the advowson of the rectory and parish church of Wilmslow, for ninety-nine years, if the grantor should so long live. Averment, that grantor was still living, and that the church became vacant by the death of the last incumbent, whereby it belonged to the plaintiff to present, but the defendant hindered him from so doing.

There was a second count, setting out a title to the advowson in gross, and omitting all mention of the manor; in all other respects it was similar to the first.

The defendant cravedoyer of the Indenture made between the plain-

(a) *S. C.* 1 Dow. & C. 416; 3 Bligh, N. S., 123, overruling 2 Barn. & Cress. 635.

tiff and Trafford, whereby it was witnessed that in consideration of 6,000*l.* paid to Trafford by the plaintiff, the former had granted, bargained, sold and demised, and by the said Indenture did grant, &c., all that the advowson, donation, right of patronage, presentation and free disposition of, in and to the rectory and parish church of Wilmslow, with the rights, members and appurtenances thereunto belonging; habendum, for ninety-nine years, if Trafford should so long live, with a proviso that when and so soon as he the said Edward Vigor Fox, his executors, &c., should have presented to the said rectory or church of Wilmslow, by reason of the same having become vacant or void by the death, resignation, deprivation, eviction, promotion or cession of J. Bradshaw, the incumbent, or otherwise, or through the wilful neglect or default of him the said Edward Vigor Fox, his executors, &c., the said rectory or church should have been suffered, as to the presentation or right of presentation thereto, to lapse, he the said Edward Vigor Fox, his executors, &c., should and would at any time or times thereafter, at the request and proper costs and charges of the said Thomas Joseph Trafford, or such person as he should appoint, reassign the said advowson to him the said Thomas Joseph Trafford, or such person as aforesaid, for all the residue which should be then unexpired of the said term of ninety-nine years, free from all incumbrances by the said Edward Vigor Fox, his executors, &c. He then craved oyer of the Indenture in the second count mentioned, which was declared to be in the same words as the Indenture in the first count, and therefore not set out on the record.

He then pleaded fifteen pleas, among which the fourth—the plea chiefly relied on—averred that the said church of Wilmslow is within the diocese of Chester, and a benefice with cure of souls; and that whilst the said Thomas Joseph Trafford was so seised of the said manor and of the said advowson, and before the making of the corrupt, simoniacal and unlawful agreement, in this plea after mentioned, to wit, on the 11th day of November, in the year of our Lord 1819, the said J. Bradshaw, then being incumbent of and filling the said church, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then despaired of, whereof, as well the said Edward Vigor Fox and Thomas Joseph Trafford, as one George Uppleby, clerk, in that plea after mentioned, to wit, on, &c.; and also at the time of making the corrupt, simoniacal and unlawful agreement in that plea after mentioned, there had notice; that whilst

the said Thomas Joseph Trafford was so seised of the said manor to which, &c., with the appurtenances, &c., and of the said advowson as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on, &c., they the said Thomas Joseph Trafford, Edward Vigor Fox and George Uppleby, and each of them, then and there, well knowing the premises, and believing and expecting that the death of the said J. Bradshaw, of the mortal disease aforesaid, was then and there fast approaching, and that by means of the death of the said J. Bradshaw, the said church would forthwith become vacant, it was in such belief and expectation corruptly, simoniacally and unlawfully, and against the form of the statute in such case made and provided, agreed by and between the said Thomas Joseph Trafford and the said Edward Vigor Fox, with the knowledge of the said George Uppleby, that the said Edward Vigor Fox should pay to the said Thomas Joseph Trafford a sum of money, to wit, the sum of 6,000*l.*, and that the said Thomas Joseph Trafford, in consideration thereof, should grant, bargain and sell to the said Edward Vigor Fox the next presentation to the said church; *and that, in order to make such grant, bargain and sale, and as a means of making such grant, bargain and sale to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance and device to evade and elude the making such grant, bargain and sale, as a mere grant, bargain and sale to the said Edward Vigor Fox, of the next presentation to the said church in express terms, the said Indenture in the said declaration mentioned to have been made between the said Thomas Joseph Trafford and the said Edward Vigor Fox should be made, and that the said Thomas Joseph Trafford should seal, and as his act and deed deliver the said Indenture:* that afterwards, and whilst the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, was so afflicted, and in such danger, state and condition as aforesaid, to wit, on the 12th day of November, in the year of our Lord 1819, to wit, at, &c., in pursuance, furtherance and performance of the said corrupt, simoniacal and unlawful agreement; and in order to make such grant, bargain and sale of the next presentation to the said church, *and as a means of making such grant, bargain and sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next presentation to the said church, and as a shift, contrivance and device to evade and elude the making such grant, bargain and sale, as a mere grant, bargain and sale to the said E. V. Fox of the next presentation to the said*

church in express terms, the said Indenture, in the said declaration mentioned to have been made between the said T. J. Trafford and the said E. V. Fox, was made, and the said T. J. Trafford did then and there seal, and as his act and deed deliver the said Indenture : and that the said J. Bradshaw, so being the incumbent of and filling the said church as aforesaid, remained and continued so afflicted as aforesaid, and in such danger, state and condition as aforesaid, from time to time in that respect in this plea above mentioned, until the time of his death, and that afterwards, to wit, on the 12th day of November, 1819, Bradshaw, so being the incumbent of and filling the said church as aforesaid, of the disease aforesaid died, to wit, at, &c. ; and by means thereof the said church then and there became and was vacant ; that, by reason of the premises, and by force of the statute in such case made and provided, the said last-mentioned Indenture became, and was, and is utterly void, frustrate and of no effect in law, and wholly inoperative to grant, pass or convey any estate, right, title or interest in the said advowson, or any presentation, or any right of presentation to the said church to the said E. V. Fox ; that afterwards, to wit, on the 30th day of December, 1819, at, &c., the said E. V. Fox, under colour, and by pretence and means of the said last-mentioned Indenture so made as aforesaid, in pursuance of the said corrupt, simoniacal and unlawful agreement, did corruptly, simoniacally and unlawfully, and against the form of the statute in such case made and provided, present the said George Uppleby, clerk, to the said bishop to be admitted, instituted and inducted into the said church of Wilmslow, to wit, at, &c. ; that by reason of the premises, and by force of the statute in such case made and provided, the said presentation of the said George Uppleby by the said E. V. Fox, so made as aforesaid, became, and was, and is utterly void, frustrate and of no effect in law.

The fifth plea was like the fourth, omitting the parts in *Italics* ; and

The sixth plea varied from the fourth only by omitting to state the privity of Uppleby.

The replication to the fourth plea took issue that it was not corruptly, &c., agreed by and between the plaintiff and Trafford, with the knowledge of Uppleby, as in that plea alleged. By a similar replication to the fifth plea, and to each of the other pleas, it was denied that it was corruptly, &c., agreed, as in those pleas alleged.

The jury found by special verdict that before and on the 12th day

of November, in the year of our Lord 1819, the said Thomas Joseph Trafford was seised of the manor and advowson within mentioned, and that before and on the said 12th day of November, in the said year of our Lord 1819, the within-named Joseph Bradshaw was the incumbent of the within-named church, in the pleadings within mentioned, and that the said church was then full of the said Joseph Bradshaw; that the said J. Bradshaw, so then being incumbent of and filling the said church as aforesaid, was, before and upon the said 12th day of November, in the said year of our Lord 1819, afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby then greatly despaired of; and that he was and continued so afflicted with such mortal disease and in extreme danger of his life, and his life was and continued to be greatly despaired of until the time of his death; and that the said Joseph Bradshaw, so being such incumbent as aforesaid, died of the said mortal disease on the said 12th day of November, in the said year of our Lord 1819, at half-past eleven o'clock at night of the same 12th day of November; that on the said 12th day of November, in the said year of our Lord 1819, at ten minutes before three o'clock in the afternoon of the same day, and whilst the said Joseph Bradshaw was such incumbent as aforesaid, an agreement was made and concluded between the said Thomas Joseph Trafford, so being seised of the said manor and advowson as aforesaid, and the said Edward Vigor Fox, for the sale by the said Thomas Joseph Trafford to the said Edward Vigor Fox of the next turn or presentation of the said church, for and in consideration of 6,000*l.* of lawful money of Great Britain; that on the said 12th day of November, in the said year of our Lord 1819, and immediately after the making of such agreement, they the said Thomas Joseph Trafford and Edward Vigor Fox, in pursuance of such agreement and in order to carry the same into effect, and as an expedient to convey the next presentation alone, sealed and delivered the within-mentioned Indenture, bearing date the 12th day of November, in the said year of our Lord 1819; and that the said agreement was made and the said Indenture was sealed and delivered in the lifetime of the said Joseph Bradshaw: that the said Joseph Bradshaw, at the time of making the said agreement and also at the time of sealing and delivering the said Indenture, was afflicted with the said mortal disease, and in extreme danger of his life, and that his life was thereby then greatly despaired of: that the said Thomas Joseph Trafford and the said Edward Vigor Fox, at

the time of making the said agreement, and also at the time of sealing and delivering the said Indenture, well knew and believed that the said Joseph Bradshaw was afflicted with the said mortal disease, and was in extreme danger of his life, and that his life was thereby then greatly despaired of; that the said agreement was made and concluded, and the said Indenture was sealed and delivered, without any knowledge or privity whatsoever of the said George Uppleby, and without any intention to present the said George Uppleby to the said church when it should become vacant.

Upon the argument on this special verdict, which took place in June, 1822, the Court of Great Sessions at Chester were divided in opinion; but, in order to carry the cause up to a higher tribunal, the judgment was entered for the defendant by consent.

On a writ of error to the Court of King's Bench, the judgment of the Court below was affirmed in Hilary Term, 1824; and the present writ of error was brought to reverse both judgments.

The question raised by this special verdict was, whether the sale of a next presentation, the incumbent being *in extremis*, within the knowledge of both contracting parties, but without the privity of, or a view to the nomination of the particular clerk, be alone, without other circumstances, void on the ground of simony.

The statute of 31 Eliz. c. 6, ss. 4 & 5, enacts, "And for the avoiding of *simony and corruption in presentations*, collations and donations of and to benefices, dignities, prebends and other livings and promotions ecclesiastical, and in admissions, institutions and inductions to the same, be it farther enacted by the authority aforesaid, that if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit or benefit, *directly or indirectly*, or for or by reason of any promise, agreement, grant, bond, covenant or other assurances, of or for any sum of money, reward, gift, profit or benefit whatsoever, *directly or indirectly, present or collate any person to any benefice* with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon, shall be utterly void, frustrate, and of none effect in law; and that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to

present, collate unto, or give or bestow every such benefice, dignity, prebend and living ecclesiastical, for that one time or turn only; and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend and living ecclesiastical; and the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have or enjoy the same benefice, dignity, prebend or living ecclesiastical."

The case was argued by Cross, Serjt., for the plaintiff in error, and by the Solicitor-General for the defendant in error. The reasons adduced on the part of the plaintiff in error, for reversing the judgment of the Court below, were as follow:—

That, by the law of England, the patronage or the right of presenting to a benefice is a property or estate, capable of being conveyed in fee, for life, for years, for any number of turns, or for the next turn only, whilst the church is full; when it is empty, incapable of being conveyed, *Baker v. Rogers* (b), *Stephens v. Wall* (c), *Brookesby v. Wickham* (d); because it is like the rent of an estate become in arrear, which is a chose in action, and cannot be assigned. But the church is full as long as the incumbent is alive, and is equally so whilst he is in his last sickness as in full health.

The patron, therefore, of a living may be changed at any time till the last moment of the existence of an incumbent, and a new patron substituted; and neither the common nor statute law imposes any restriction in this respect on lay patrons (e).

It is the exercise only of the right of presenting by the patron for the time being which is a public trust, and as such controlled by law, which sufficiently guards the interest of the church, by providing that the existing patron shall not nominate from corrupt motives, or by reason or in consequence of a corrupt contract.

This restriction arises from the statute of 31 Eliz. c. 6, and from this statute only; and the question turns entirely upon the construction to

(b) Cro. Eliz. 789.

(c) Dyer, 282 b.

(d) 1 Leon. 167.

(e) 12 Anne, st. 2, c. 12, applies to clerks only.

be put upon its provisions. It is a penal statute, and it creates forfeitures; and, therefore, according to the acknowledged principle of law, must be construed strictly, and not extended by a supposed equity.

The statute avoids the presentation which the patron for the time being makes for any money, reward, gift, profit or benefit, arising directly or indirectly; or for any promise of such reward, directly or indirectly. It is direct or indirect reward, not direct or indirect presentation, which it prohibits in express terms.

In the present case, Mr. Fox, the plaintiff in error, was the patron at the time of the actual vacancy, and he selected the clerk, without any communication with Mr. Trafford; and his selection was not influenced or produced by money or reward, directly or indirectly. The presentation by the actual patron is not tainted with the least suspicion of simony.

To bring the case within the provisions of the act, it must be contended, as it was in the Courts below, that Mr. Trafford was to be considered as the patron presenting the clerk, and receiving the reward for that purpose, and the plaintiff in error as the mere instrument to carry such presentation into effect. But there is nothing in the finding of the jury to warrant such a conclusion.

It is admitted that the grant of a next presentation during the life of an incumbent may be void on the ground of simony; but that is where the contract is really simoniacal—a contract for the presentation *by* the patron of a *particular clerk* for money, and the conveyance of the next presentation is a contrivance or instrument to carry it into effect. This will be illustrated by the case of *Winchcome v. Pulleston* (*f*), the leading case on the subject; the pleadings in Winch's Entries, 887, fully explain the nature of the transaction. The contract was made between the clerk to be presented and the patron, the incumbent being then sick of a grievous disease, and expected every day to die, that in consideration of 90*l.* to be paid by the clerk to the patron, he should procure him to be presented to the church when vacant; and to assure such presentation he should grant the next avoidance to a person, a familiar friend of the clerk, specially nominated and appointed by him in confidence to make the presentation, with the intent that the clerk should be presented; and it is averred, that in performance of this contract the grant was made, and the contract was so found by the jury. Here was

(*f*) Noy, 25; Hob. 165; 1 Brownl. & Golds. 164.

a clear simoniacal contract, and the substituted patron was the mere instrument to carry the contract into effect, and to appoint the particular clerk. The case of *Closse v. Pomcoyes* (g) is nearly to the same effect, and is another instance of a contrivance to carry into effect a simoniacal contract.

If the presentation do not appear upon the face of the pleadings to be clearly simoniacal, that is, a presentation by the existing patron of the clerk for reward, it is a question for the jury whether each transaction be or be not a shift or contrivance to carry a simoniacal contract into effect; as, under the statutes against usury (h), if there appear on the face of an instrument a loan, and a reservation of illegal interest, the Court can give judgment against its validity; but if the transaction does not appear on the face of it (*Yeoman v. Barstow* (i), *Kitchin v. Calvert* (k)) necessarily to be usurious, it is a question of fact for the jury, and whether it be a shift or contrivance or not. In both cases, the really simoniacal or usurious contract ought to be shown by a special plea when a special plea is required, and in all cases found by the jury.

The defendant has not pleaded in this case, and the jury have not found that there was any corrupt or simoniacal contract, that Trafford should present the clerk; and that the grant of the next presentation was a mere contrivance to carry it into effect.

In the absence of such a finding, the Court cannot make any presumption against the validity of the grant. Simony as well as fraud is not to be presumed, but found.

But if it were competent for the Court to make any presumption, the facts pleaded and found do not warrant any such presumption in this case.

If it had been found that money was to have been given to Trafford if Uppleby should be presented, or that it was the purpose or even intent of the plaintiff to have presented Uppleby, it might have been argued that the grant was made for that purpose, and if so, the grant may possibly be said to be an instrument to carry into effect the particular appointment; and the clerk may possibly be said to have been presented by the former patron. In such a case the substituted patron has no power of selection, but is a mere instrument; and this appointment, made virtually by the old patron, is an appointment made

(g) Cited Lane, 73.

(h) Since abolished.

(i) Lutw. 273.

(k) Lane, 100.

for reward. But if there is no intention or purpose to present any particular clerk, the new patron is a free agent, may select whom he pleases, and if he select any clerk without reward, he is not within either the letter or the spirit of the act. The selection of the clerk, the object aimed at by the statute, is free from all taint. The old patron parts with, and the new patron purchases, the right of selection, by means of the grant, and that right is fairly and properly exercised.

The judgment of the Court of King's Bench (*l*) proceeds in a great degree upon the ground that Courts have a right to consider what is an evasion of a statute, a power which, it is humbly conceived, does not apply, at least to the case of a penal statute creating forfeitures, and if allowed to be exercised would lead to great doubt and uncertainty in the law.

Upon referring to decided cases, there is none in which it has been held that the grant of a next presentation, the incumbent being *in extremis*, is void, a short note in Winch, 63 (*m*), excepted, in which mention is made of its having been so adjudged in Chancery, but under what circumstances does not appear; it may have been so adjudged on the special facts.

On the other hand, there is a solemn decision of the Court, *Barret v. Glubb* (*n*), that by the grant of an advowson, when the incumbent was on his deathbed, and it was uncertain whether he would live over the night, with full knowledge in the contracting parties, the next presentation did pass, and was not avoided by simony, which is a direct authority for the plaintiff in error. If the grant of next presentation, when united with all other future presentations, was not void, the grant of the next presentation alone could not be so. This decision has never yet been questioned until the present case.

The argument for the defendant in error was in substance as follows :—

1st. Simony was an offence by the common law of the land, antecedently to the statute of 31 Eliz. c. 6, and the transaction, as stated upon the record, was a corrupt and simoniacal contract for the sale of the next living or presentation, under the special circumstances of the case, 1 Inst. 17 B; 3 Inst. 156; *Mackaller v. Todderick* (*o*); *Winchcombe v. Pulleston* (*p*); *Bartlett v. Vinor* (*q*).

(*l*) 2 Barn. & Cress. 658.

(*m*) *Sheldon v. Bret*.

(*n*) 2 Black. 1052.

(*o*) Cro. Car. 361.

(*p*) Hob. 167.

(*q*) Carth. 252.

2ndly. The presentation in the present case was substantially a presentation by Mr. Trafford, the seller, and was by him a presentation for money.

3rdly. The transaction in question was a shift and contrivance to evade the provisions of the statute of 31 Eliz. c. 6.

4thly. It was a presentation by Mr. Trafford, for money, of such clerk as Mr. Fox might nominate; and a contract to such effect is simoniacal, though it may have passed without the privity of the clerk who may afterwards happen to be presented. The privity of a clerk is not a necessary ingredient in a corrupt or simoniacal contract, as has been established by several authorities, and particularly in *Doctor Hutchinson's Case* (r), and in the case of *Baker v. Rogers* (s).

5thly. By law, no grant can be made of the next presentation when the church is empty, *Brookesbie's Case* (t); of which rule, though it has been sometimes said that the reason is that the presentation is then a fruit fallen, or that it is a mere personal privilege, or that it is severed from the advowson, and would pass to the executor, the true and substantial reason is public utility, and the better to guard against the mischiefs of simony, as was expressly laid down by Lord Mansfield, C. J., and Wilmot, J., in *The Bishop of London v. Wolforstan* (u). And the contract in the present instance was made upon the footing and understanding of the church being full in name and form only, but vacant in substance and reality.

6thly. The law, of which the object and policy is the presenting to benefices, with cure of souls, of men of learning and piety, and the preventing of scandal to religion and prejudice to the Church, by preferments either of improper persons or from corrupt motives, will not endure the danger which would arise from the sale of the right of presentation when the incumbent is at the point of death, where the contracting parties knew that fact, and where the contract is made with a view to, and upon the terms of, an immediate presentation.

7thly. There is no mischief intended to be guarded against by the rule of law prohibiting the sale of the next presentation, when the church is empty, which might not be equally incurred if such presentation could be sold when the incumbent is on his deathbed, and known to be so both to the buyer and to the seller.

(r) 12 Rep. 101.

(s) Cro. Eliz. 788.

(t) Cro. Eliz. 174; S. C. 1 Leon. 156;

3 Leon. 256; Dyer, 282.

(u) 3 Burr. 1504.

8thly. The statute 31 Eliz. c. 6, ought to receive a liberal construction in order to reach the evil for the remedy of which it was passed, and because the deed set forth in the record was only a contrivance to pass an immediate presentation for money, in violation of the policy, and evasion of the provision of the statute.

Lastly, in *Sheldon v. Bret*, it was expressly decided, that a grant of the next turn for money was simoniacal, when the parson was sick in his bed and ready to die.

On this day the opinion of the Judges of the Courts of Common Pleas and Exchequer was delivered as follows by—

Best, C. J. (v):—My Lords, the question which your Lordships have been pleased to put to the Judges in this case is, whether, upon the whole of the matters stated or referred to in the special verdict, the right to present to the rectory or parish-church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox the plaintiff in error. The Judges who heard the argument at your Lordship's bar are unanimously of opinion, that upon the whole matters stated or referred to in the special verdict, the right to present to the rectory or parish-church of Wilmslow, upon the death of the Rev. Joseph Bradshaw, was by law vested in Edward Vigor Fox the plaintiff in error.

The patronage of churches was at first yielded by the bishops to the lords of manors who founded or endowed them, and annexed them to the manors in which the churches were situate. By the grant of a manor, the *advowson appendant* to it passes to the grantee. Many of these advowsons have since been severed from the manors to which they were appendant.

Although advowsons, when in *gross*, as these which are separated from the manors to which they belonged are called, are a species of spiritual trusts, yet they have been said by Lord Kenyon and other Judges to be trusts connected with interests; and they certainly do not lose the temporal character which originally belonged to them, but may be sold either in perpetuity, or for the next or any number of avoidances.

If the perpetual advowson be sold when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void. It may be wise to carry the restraint on the sale of this species of property still

(v) Afterwards Lord Wynford.

further, and to say the next avoidance shall in no case be sold. Undoubtedly, much simony is indirectly committed by the sale of next presentations. If it be proper to prevent the giving of money for a presentation, it seems equally proper to prevent the sale of that which gives the immediate right to present. But the Courts of Law have never thought that they were authorized to go this length; and, even in cases where the purchase of the next presentation seemed to bring a party nearer to simony than in any other, it was found necessary to have the aid of the legislature to prevent such purchases. A clergyman might buy a next presentation and present himself, before the passing of the statute of the 12 Anne, c. 12. The preamble to the second section of that statute states that "some of the clergy have procured preferments for themselves by buying ecclesiastical livings," and then the section provides, that if any one shall, either directly or indirectly, take or procure the next avoidance for money, reward, gift, profit or benefit, or shall be presented or collated (which words limit the operation of the act to clergymen), that it shall be deemed simoniacal.

It seems to me that, if the terms of the statute of Elizabeth could be extended by equity, the case of a clergyman buying a presentation with the intention of presenting himself might have been reached without any other act of parliament. If such a case as that were not within the statute of Elizabeth, the case on which your Lordships have desired our opinion cannot be affected by that statute. The church, in the present case, was full; no clergyman was privy to the agreement; and the living was not intended by the plaintiff in error, at the time he bought the presentation, for the clerk that he afterwards presented. But I would observe, that persons have recovered who appeared to be dying. The special verdict only states, that the incumbent, at the time of the sale, was afflicted with a mortal disease, so that he was then in extreme danger of his life, and his life was thereby greatly despaired of; and that he was so afflicted with such mortal disease, and in extreme danger of his life, and his life was and continued to be greatly despaired of until his death, which happened at half-past eleven at night of the day on which the sale was completed. Many who are afflicted with mortal diseases, and are from such diseases thought to be in imminent danger of dying, live for a considerable time, and the effect of the diseases are sometimes so far suspended, that the persons so afflicted become again capable of performing the duties belonging to their stations in life.

If this conveyance was void, it must have been void at the time it

was executed, and would remain void into whatever hands and under whatever circumstances the right of presentation might have passed. Now if this incumbent had been restored to apparent health, and the vendee had sold the presentation to another person ignorant of the circumstances under which the first sale was made, it would be most unjust to hold that the second sale was void; and yet this would be the necessary consequence of a decision that the sale was simoniacal. Whilst the law permits the next presentations of livings to be sold during the lives of the incumbents, as long as the incumbent is alive the sale is good. Every one who purchases a next presentation contemplates the death of the incumbent. If this contemplation made the sale void, no sale of a next avoidance could be good. If the death of the incumbent, and the prospect of using the presentation, may be contemplated, the time when the death is to happen cannot be material.

This case has been compared by the counsel for the defendant in error to those of contemplation of bankruptcy. But a party is not permitted to do an act in contemplation of bankruptcy which is injurious to creditors. A transfer of goods or payment of money in contemplation of bankruptcy, was, before the 6 Geo. 4, void. By that act, such a transfer or payment is an act of bankruptcy, because such transactions are direct frauds on the creditors of the bankrupt. But the death of an incumbent may be contemplated, and the purchasing of the next avoidance, in consequence of such contemplation, is no fraud upon any one. The cases, therefore, have no resemblance to each other. The making the legality of the transaction to depend on the state of the incumbent's health would give occasion to much expensive litigation, and, probably, to much false swearing, and would keep churches for a long time void.

The affairs of men are best regulated by broad rules, such as exclude all subtle disputes, all doubtful, unsatisfactory inquiries. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent should prevent the sale of the avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that degree. I submit to your Lordships that the most convenient rule is that which I conceive the law has already established, namely, *that the right to sell the presentation continues as long as the incumbent is in existence.*

The judgment of the Court below is, according to the words of the Chief Justice, "founded on the language of the 31 Eliz. c. 6, and the

well-known principle of law, that the provisions of an act of parliament shall not be evaded by shift or contrivance." The words of the fifth section of the act are, "If any person shall, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly present or collate any person to any benefice, or give or bestow *the same* for or in respect of any such corrupt cause or consideration." This clause applies only to the person presenting to the living. If he has received no reward or promise of reward, the presentation is not affected by the terms of the act. The plaintiff in error, who made the presentation, received no reward, nor had any expectation of reward, for making this presentation. I agree, that if some other person had received a reward for the plaintiff in error, and was to account to him for it,—if the plaintiff in error was not the real purchaser of the avoidance, but the person presented, or some one in his behalf, these and many other things might be considered as frauds on the act, and have avoided the contract. But such things should have been shown by the pleadings, and found by the jury. All that appears on this record is, that the plaintiff in error bought the next avoidance of a living that was full; and that, without any corrupt consideration, he used the right of presentation which he had purchased. All this he had a right to do. There is no circumstance found that shows this is a fraud on the act, unless it be a fraud on the act to buy the presentation to a living which the seller and buyer expect will soon become vacant. Presentations are bought and sold every day with this expectation.

There is no legal authority to support the judgment of the Court, except a short and loose note in Winch's Reports of Hutton, saying what used to be done in Chancery. On the other hand the case of *Barrett v. Glubb* is directly opposed to the judgment of the Court of King's Bench. It was thought that case had not the weight of a judicial decision, because it was not acted upon. But it was acted upon. Lord Bathurst decreed the conveyance of the advowson which included the next presentation, and gave the purchaser and his clerk their costs. The seller must have acquiesced in this decision, or he would have prosecuted his *quare impedit*; and if the Common Pleas had retained the opinion that they had certified to the Chancellor, he might have carried it, by bill of exceptions, to the King's Bench.

When the Chancellor decreed a conveyance, without doubt it was such a conveyance as gave the purchaser a legal title from a time before the death of the incumbent, by making the assignment take effect from the date of the contract to assign; there was, therefore, no occasion for any injunction, as was supposed by the King's Bench. The question, by the conveyance decreed, was fairly raised for another Court of Law, if the party had not completely acquiesced in the judgment of the Common Pleas, confirmed by that of the Chancellor. There are no other cases in the books which bear much on the question proposed to us by your Lordships. For the reasons given in support of the Judges' answer to that question, I only am responsible.

Earl of Eldon.—My Lords, I will trouble your Lordships with a very few words on this case, which involves questions certainly of very considerable importance. A case upon the same subject was decided by the Court of Common Pleas many years ago; and the manner in which that case was decided in the Court of Common Pleas was of very great importance: first, because it was a case in which a Court of Equity sent the case for the opinion of that Court, in order to enable that Court of Equity to decide what it should do in equity. The case was this: there had been the purchase of an advowson, the incumbent being at the time in such a state that he died within two days afterwards. I believe, indeed, the period was very nearly the same, if not exactly the same, as in the present case. Your Lordships will recollect it was one circumstance in that case, that the intended purchaser of the estate stated that there must be no delay, but that the contract should be immediately completed. The Court at that time was filled by Lord Chief Justice De Grey (a very eminent judge), Mr. Justice Blackstone, and by two other Judges. The case was sent by Lord Bathurst for the opinion of the Court of Common Pleas, for the purpose of enabling the Lord Chancellor to determine whether the mere contract should be carried into execution by an actual conveyance. Now that being the nature of the case, and that being a case in equity, makes it a much stronger case than if the Court of Equity had not taken that course; because your Lordships will recollect, that with respect to many cases of contracts which come before Courts of Equity, the parties resort to a Court of Equity because it is conceived there are grounds upon which a Court of Equity will grant its interposition to carry into effect that contract. In that case the controversy was, whether, supposing that contract to be good in

law, the party ought to be left to his remedy at law instead of coming into equity for a specific performance of the contract; however, the Chancellor of that day thought fit to take the opinion of the Court of Common Pleas upon the question, whether the advowson being sold at such a period, nearly approaching the death of the clergyman, the presentation as well as the advowson being included in the conveyance, carried with it the assignment of the presentation; and, my Lords, the Court of Common Pleas were of opinion that it did, and so they certified to the Court of Chancery. I observe in the proceedings in this case in the Court below, the Court seems not to have been fully informed by the counsel at the bar; and I may take the liberty of saying so, because I see two Judges of that Court who now concur in the opinion that this was a good conveyance, and who then thought it was not a good one. The Court, my Lords, seem to me to have been not specifically informed as to what was the fact. We have heard it stated at the bar, that an injunction had been granted by the Lord Chancellor against the proceedings in the *quare impedit*; and that, after that opinion of the Court of Common Pleas was communicated to his Lordship, he did not continue the injunction. Now, my Lords, that circumstance is really of no weight. It was quite unnecessary to continue the injunction, because the moment it was intimated that in the opinion of the Court of Common Law the contract was a good contract to be carried into execution, it was not necessary to take the trouble of asking for the injunction being continued, for the conveyance was immediately executed which carried the contract into execution; and that conveyance having been executed, it would be a good conveyance of the presentation as well as of the advowson. The conveyance being a good conveyance of the presentation, being declared by the Court of Chancery to be a good equitable conveyance of the presentation, and the Lord Chancellor proceeding on the opinion of the Court of Common Pleas, there was an end of all question. Now, my Lords, regarding the effect of this decision on human transactions, seeing that in all probability many transactions have taken place upon the footing of it, it does appear to me, I confess, very undesirable that that decision should be shaken by the Courts of Law. I confess I had much rather see an act of parliament than see a further extension of that doctrine of which we have heard in the argument at the bar; and I am very happy to take the opportunity of stating to your Lordships that I most fully concur in the opinion which has been expressed by the learned Judges.

The LORD CHANCELLOR (Lord Lyndhurst).—Is it your Lordships pleasure this judgment be reversed?

Judgment reversed.

Fox v. The Bishop of Chester is a leading case, upon the law relating to advowsons, an important class of incorporeal hereditaments, and the opinion of the Judges of the Courts of Common Pleas and Exchequer as delivered by Best, C. J., contains a very lucid exposition both of their origin, and of the mode in which, whether considered as a trust, or the subject of property, they may be dealt with.

In examining the law respecting advowsons, it is proposed to consider —I. Their origin and how many kinds there are; II. Appropriations; III. Unions; IV. Presentations to advowsons; V. On the examination of persons presented; VI. Admission, institution, induction, and necessary acts of the presentee; VII. On lapse; VIII. Descendible properties and other incidents of advowsons; IX. Title to advowsons and next presentations by purchase, when legal, when void as simoniacal; X. Bonds of resignation; XI. Title to advowsons by prescription; XII. On the several remedies relating to advowsons.

I. *The Origin of Advowsons, and how many Kinds there are.*

Advowsons are of three kinds; 1. Presentative; 2. Donative; and 3. Collative.

1. *Presentative Advowson.*

A presentative advowson is, the right of presenting of a clerk to be incumbent of a church, by institution and induction. This right was originally gained by persons who either founded or endowed the church, or gave the site whereon it was built; they are usually termed patrons, and their right of presentation, the right of patronage. Co. Litt. 119 b.

Churches were in general founded by lords of manors for the use of their tenants, hence they were originally *appendant* to, and passed by a mere grant of, the manor without saying “with the appurtenances” (Ib. 307 a); they may also be *appendant* to other corporeal hereditaments, as a castle, house, parsonage, church, demeane of a manor, or a certain number of acres, or an acre, of land (Ib. 121, 122 a; *Tyrringham's Case*, ante, 75; *Potter v. Sir H. North*, 1 Vent. 386; *Hill v. Grange*, Plowd. 170), but not to anything incorporeal, as a reversion. *Fulmerston v. Steward*, Plowd. 103.

There are also advowsons *in gross*; that is to say, where the right of presentation is attached to the person, and is not *appendant* to any corporeal hereditament. An advowson of this kind may have been so originally, as

where the person who merely built the church became the patron (Mirehouse, Advow. 13), or, where it was severed from a manor either by an exception of the advowson from a grant of the manor, to which it was appendant (*Fulmerston v. Steward*, Plowd. 103), or, by a grant of the advowson, without the conveyance of the manor or other corporeal hereditament to which it was appendant. *Ive's Case*, 5 Co. 11; *Fulmerston v. Steward*, Plowd. 103.

A lease of the corporeal hereditament for a freehold interest as for life, would render the advowson in gross during the existence of the lease (*Ib.* See also *Hartopp and Cock's Case*, Hutt. 88; Co. Litt. 325 a); but, if the lease be for a term of years, the advowson would still continue appendant. *Lilford's Case*, 11 Co. 50.

If there be a complete severance of the advowson from the hereditament to which it is appendant, it can never become appendant again; even although the hereditament and the advowson come again into the hands of the same party (*Arthington v. The Bishop of Chester*, 1 H. Black. 426; *Rex v. The Bishop of Rochester*, 1 Mod. 1). If, however, the severance be only conditional, the advowson will only remain in gross, until the condition be fulfilled. Thus, where the lord mortgages a manor in fee excepting the advowson (which thereby becomes in gross), if the money be paid on the appointed day, the advowson becomes appendant again; but, if the money be paid *after* the day, the appendancy is destroyed, although, being appendant in reputation, it may pass by the name of an advowson appendant. *Rex v. The Bishop of Chester*, 2 Salk. 24.

Where, however, the severance takes place by operation of law, as for instance by a partition of a manor between coparceners, the advowson, in the absence of any express exception, will remain appendant, and each coparcener will present in turn. *Ib.* 25; 1 Ld. Raym. 292.

If, upon partition, the whole demesnes are allotted to one coparcener, and the services to the other, (by which means the manor is destroyed, and the advowson becomes in gross,) and one of them dies without issue, so that the demesnes descend to the one who has the services, the manor is revived, and the advowson again appendant. *Reynolds v. Blake*, 2 Salk. 25; 1 Ld. Raym. 198; *Wyat Wild's Case*, 8 Co. 79 b; *Sir Moyle Finch's Case*, 6 Co. 64; *Rex v. The Bishop of Chester*, 2 Salk. 25.

Where the severance of an advowson from the hereditament to which it is appendant is effected by a wrongful act, it may be rendered appendant again by defeating such wrongful act. Co. Litt. 363 b.

An advowson may be partly appendant and partly in gross; as where a person having an advowson appendant grants every other presentation to a third party, it will be appendant for the turn of the grantor, and in gross for the turn of the grantee. *Anon.*, Dy. 259 a; and see *Marshe and Smith's Case*, 1 Leon. 26; Dod. Adv. 60.

Where by a private act, providing for the sale of part of the glebe and the erection with the proceeds of an additional church, it was provided, that the

curate thereof should, during the incumbency of the then rector, be *appointed* by him, and that on the avoidance of the rectory by his death, &c., the new church was to become the principal church, with all the rights of a mother church, and the old one be deemed a chapel of ease thereto, and that the *presentation* thereof, as well as of the new church, should be vested in the patron of the rectory and his heirs; so, nevertheless, that the minister of the chapel should not be removable at pleasure; it was held by the Court of Common Pleas, that such chapel of ease was made thereby *presentative* and not *donative*. *Regina v. Lord Foley*, 2 Man. G. & S. 664.

2. *Donative Advowson.*

A donative advowson is a right of nomination to a church, chapel or vicarage, by the patron alone, without presentation, institution or induction, which, as we have seen, are necessary in the case of a presentative advowson. *Fairchild v. Gayre*, Cro. Jac. 63; *Powell v. Milburn*, 3 Wils. 365.

A clergyman, however, in order that he may accept or retain a donative, must comply with certain requisitions; he must be of twenty-three years of age, and in priest's orders; he must read the proper prayers, subscribe to the declaration of conformity, take the oaths of allegiance and supremacy, and abjuration, subscribe the Thirty-nine Articles, and read them if it be a place with cure of souls, and also the ordinary certificate of his subscription of the Thirty-nine Articles as prescribed by the law. See 13 Eliz. c. 12, ss. 1, 3; 13 & 14 Car. 2, c. 4, s. 6; 1 Will. & Mary, c. 8, s. 7; 1 Geo. 1, c. 13, s. 2; 9 Geo. 2, c. 26; 6 Geo. 3, c. 53; *Powell v. Milburn*, 3 Wils. 355; Black. 851; *Green's Case*, 6 Co. 29; Mirehouse, Advow. 23.

It is said however, that if the patron of a donative presents to the ordinary, and suffers an admission and institution thereupon, he thereby makes it always presentative. *Fairchild v. Gayre*, Cro. Jac. 63; and see *Regina v. Lord Foley*, 2 Man. G. & S. 664.

The ordinary has no power of visitation or deprivation over the incumbent of a donative (1 Inst. 122; Co. Litt. 344 a); nor can he interfere with the church, as by the regulation of seats (*Walter v. Gunner*, 1 Hagg. 319); and he has jurisdiction only over the incumbent for personal offences (*Colefatt v. Newcomb*, Ld. Raym. 1205; *Powell v. Milburn*, 3 Wils. 355, 365); except in the case of a donative augmented by Queen Anne's bounty (1 Geo. 2, c. 10, s. 14), with the consent in writing of the patron, under his hand and seal (s. 15).

Where a vacancy occurs in a presentative advowson during the life of the ancestor, the executor will present (post, 156); in the case of a donative, the heir at law will have the right of nomination. *Repington v. The Governors of Tamworth School*, 2 Wils. 150.

Upon the acceptance by the incumbent of a presentative advowson of a bishopric, the crown will have the next presentation (post, 155), but it will not if the advowson be donative. *Attorney-General v. Bishop of London*, 4 Mod. 213; 1 T. R. 399.

The resignation of a donative should be made to the patron, and if there be two, it will be sufficient if it be made to one. *Fairchild v. Gayre*, Cro. Jac. 63.

3. Collative Advowsons.

A collative advowson is where the right of nomination is vested in a bishop. The act of collation by the bishop is equivalent to both presentation and institution, in the case of a presentative advowson, and induction is only necessary. Mirehouse, Advow. 40.

Although a church in ordinary cases is full, by institution, and cannot (except in the case of the crown) be revoked even before induction (Ib. 41); this is not the case after a collation. Hence, if a bishop collate without title, and his clerk is inducted, and six months elapse, the rightful patron will not be put out of possession; and he may present without being compelled to take legal proceedings. Co. Litt. 344 b; 2 Inst. 358; 7 Anne, c. 18; *Boswell's Case*, 6 Co. 50 a; *Green's Case*, 6 Co. 29 b; *Gawdy v. Archbishop of Canterbury*, Hob. 301; *Stanhope v. The Bishop of Lincoln*, Hob. 242.

If a bishop, after collating to a church, dies before the induction of the clerk, the crown, as having the temporalities of the vacant see, will be entitled to the right of presentation, and not the successors or executors of the bishop. Co. Litt. 90 b, n. 4; Fitz. N. B. 34, 36. As to collation by lapse, see post, 159.

II. Appropriations.

Where the presentee has during his life, the freehold in himself of the parsonage house, glebe, tithes, and other dues, he is called the parson or rector. Where, however, these have been appropriated by some spiritual corporation, either sole or aggregate, termed appropriators, or by lay appropriators, the presentee is called a vicar, and in general has only a small portion of the profits of the benefice, the rest going to the appropriators. *Grendon v. Bishop of Lincoln*, Plowd. 493.

In some cases of appropriation there is no vicar, but a permanent minister, termed a perpetual curate. See *Doe v. Thomas*, 9 Ad. & Ell. 556; *Hins v. Reynolds*, 2 Mann. & Gr. 71; *Doe d. Brammall v. Collinge*, 7 C. B. 939; 1 Geo. 1, c. 10, ss. 4, 21.

Appropriations seem to have owed their origin to the religious houses (previous to the Reformation) getting possession of numerous advowsons, and after providing a clerk, whom they paid with a small part of the revenues of the living, applied the rest for the purposes of their own communities. Upon the dissolution of the monasteries, by 27 Hen. 8, c. 28, and 31 Hen. 8, c. 13, appropriations were vested in the crown, and many grants were made of them to laymen. See further on this subject 3 Steph. Comm. 19; Mirehouse, 83.

Sinecure rectories are now abolished. 3 & 4 Vict. c. 113, s. 48.

III. *On Unions.*

It seems that by common law, where churches were too poor and unable to support the charges to which they were subjected, they might be consolidated or united with the consent of the parson, patron and ordinary. *Harman v. Renew*, 1 Salk. 165; *Austyn v. Twyne*, Cro. Eliz. 500; *Reynoldson v. Blake*, and *the Bishop of London*, 1 Ld. Raym. 192.

The statutes concerning unions (37 Hen. 8, c. 21; and stat. 17 Car. 2, c. 3), which did not alter the common law upon the subject, have since been repealed by 1 & 2 Vict. c. 106, s. 16, which now regulates the law upon the union and disunion of benefices. See also 13 & 14 Vict. c. 99, s. 7; 2 Steph. Laws of the Clergy, 1309.

IV. *On Presentations.*

A presentation has been defined to be "the offering of a clerk to the ordinary, to be instituted to the church." Co. Litt. 120 a.

Since the Statute of Frauds (29 Car. 2, c. 3), presentations must be made to the bishop in writing, and by 55 Geo. 3, c. 184, they must be stamped.

The crown as head of the Church of England presents to all benefices not belonging to other patrons (1 Eliz. c. 1), or which belong to an archbishopric or bishopric, and which become void during the vacancy of the see (Bro. tit. Presentment, 10, 13); or which are in the possession of incumbents on their being made bishops (*Basset v. Gee*, Cro. Eliz. 790; *Wentworth v. Wright*, Ib. 526; *Woodley v. Bishop of Exeter*, Cro. Jac. 691; *Colt and Glover v. The Bishop of Coventry*, Hob. 140; *Troward v. Cailland*, 6 T. R. 439); but the Lord Chancellor, or keeper of the great seal, has the right to present to such of those livings as are below the value of 20*l.* in the King's Books, according to the valuation in the time of Henry the Eighth. *Lord Chancellor's Case*, Hob. 214.

Where the Lord Chancellor presents to a living over the above value, the crown may, even after admission and institution (*Bedinfield v. Archbishop of Canterbury*, Dy. 292; *Walrond v. Pollard*, Dy. 293; *Green's Case*, 6 Co. 29), but not after induction (*Lord Chancellor's Case*, Hob. 214), revoke the presentation. But the first presentation will remain good, if the second were obtained by fraud. *Green's Case*, 6 Co. 29.

The crown may by its own act revoke its presentation at any time before induction (Co. Litt. 344 b; 2 Roll. Abr. 353), or such presentation may be revoked in law, as by the death of the king (Godolp. Repert. 266); or (even although the crown be only entitled to one turn) by the death of the clerk (*Thomas Holt's Case*, 9 Co. 132 b; *Gyles v. Colshil*, Dy. 360 b; *Sheffield v. Ratcliffe*, Hob. 339; *Hutchins v. Glover*, Cro. Jac. 463; *Wright v. The Bishop of Norwich*, 1 Leon. 156) before induction, and the king may present again.

If the crown has only two parts of an advowson, and a subject the remaining part, inasmuch as no subject can be tenant in common with the

crown, the crown alone will have the right of presentation. *The Chancellor of Cambridge v. Walgrave*, Hob. 127.

All persons having an interest, whether in fee, in tail, for life or for years, in an advowson, appendant or in gross, may present on the occurrence of a vacancy. *Mirehouse*, 138; *Amb.* 166.

Where the advowson is in fee, if it be not devised, as a general rule it descends to the heir. *Co. Litt.* 388 a.

Where, however, the vacancy occurs during the life of the patron seised in fee, the next presentation is considered a chattel and goes to his personal representative (*Mirehouse v. Rennell*, 8 Bing. 490); except where he is also incumbent, in which case the advowson descends to his heir (*Holt v. Bishop of Winchester*, 3 Lev. 47; *Harris v. Austen*, 3 Bulst. 47); unless he have devised the next presentation, which will be good although the church became void by his death. 1 Leon. 205; *Harris v. Austen*, 2 Roll. Rep. 214.

During coverture the husband of a woman having an advowson presents jointly with her in both their names, and after her death, if they had issue who might have inherited, he will present as tenant by the curtesy (*Co. Litt.* 29 a, 120 a, 166 b, 388 a). Where a husband dies seised of an advowson which descends, the heir will have the next two presentations, the widow the third, by right of her dower. *Ib.* 32 a.

An infant, whatever may be his age, and not his guardian, will present. *Shoplane v. Roydler*, Cro. Jac. 95; *Co. Litt.* 17 b, 89 a; *Hearle v. Greenbank*, 3 Atk. 710. Where the owner of an advowson is lunatic the Lord Chancellor presents to the living, usually giving it to a member of the family; this right seems to have been first exercised by Lord Talbot, whose example has been followed by all his successors. *Shelf. Lun.* 11; 1 Woodes. Lect. 409.

Joint tenants must concur in a presentation, but if they present different clerks the bishop may admit either or refuse both; in the latter case, unless the joint tenants concur in the presentation, he may, after six months, present by lapse (*Co. Litt.* 186 b); there may, however, be a partition to present in turns (*Bishop of Salisbury v. Philips*, Ld. Raym. 535; 1 Salk. 43). Where, however, there are two incumbents to an advowson, one part of the church may be allotted to one, another part to the other (*Smith's Case*, 10 Co. 135 b; *Holland's Case*, 4 Co. 75; *Windsor's Case*, 5 Co. 102; *Co. Litt.* 17 b). Where an advowson descends to coparceners, and they cannot agree to present, the law gives the first presentation to the eldest, and Lord Coke says, "this privilege shall descend to her issue; nay, her assignee shall have it, and so shall her husband that is tenant by the curtesy have it also" (*Co. Litt.* 166 b; *Gully v. Bishop of Exeter*, 10 B. & C. 584), the alienee of the elder sister would have the like privilege. *Barber and Cooke v. The Bishop of London*, Willes, Rep. 659.

An advowson being an entire inheritance, the only mode of effecting a partition of it between parties jointly interested therein as joint tenants, tenants

in common, or coparceners, is by presentation to it in turn (Co. Litt. 164 b); and this may be effected either by a suit in equity or by arrangement between the parties. *The Bishop of Salisbury v. Philips*, 1 Salk. 43; Carthew, 505.

Where the clerk presented by a coparcener, having been complete incumbent and the church full, is afterwards deprived, the turn is gone (*Windsor's Case*, 5 Co. 102); but where the church remains void, in consequence of the clerk, after presentation, institution and induction, not having conformed to certain statutes, as by neglecting to read the articles, the coparcener may present again. *Windsor v. The Archbishop of Canterbury*, Cro. Eliz. 687; Moo. 558; *Baker v. Brent*, Cro. Eliz. 679.

Corporations present by their true name and under their common seal. *Ayray v. Sir R. Lovelas*, 1 Bulst. 91; see *Mayor and Burgesses of Stafford v. Bolton*, 1 Bos. & Pul. 40.

The presentation of benefices belonging to papists is vested by 1 Will. & Mary, c. 26, in the universities of Oxford and Cambridge (see also 3 Jac. 1, c. 5; 12 Anne, st. 2, c. 14; 11 Geo. 2, c. 17); but where there are two tenants in common of an advowson, one a protestant and the other a papist, the right of presentation devolves on the protestant alone. *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 652.

The mortgagor, even although there be an express agreement that the mortgagee shall have the presentation (*Jory v. Cox*, Prec. Ch. 71; *Amhurst v. Darling*, 2 Vern. 401; *Gally v. Selby*, Stra. 403; *Kensey v. Langham*, Ca. T. Talb. 143; *Mackenzie v. Robinson*, 3 Atk. 559, overruling *Gardiner v. Griffith*, 2 P. Wms. 403), or a bankrupt (12 & 13 Vict. c. 106, s. 147), if a vacancy occur before sale, and the person having the equitable interest when the bare legal estate is vested in trustees (*Sherrard v. Lord Harborough*, Amb. 165), will present to an advowson.

A patron may, it seems, revoke a presentation before, but not after, admission and institution (*The King v. The Bishop of Norwich*, Cro. Jac. 385; *Stoke v. Sykes*, Latch. 191; *Stoke v. Styles*, Ib. 253); and it seems if he present two clerks, although one may be after the other, the ordinary may choose either of the two. *Rogers v. Holled*, 1 Bro. P. C. 117, Toml. Ed.; 2 Black. 1039.

V. On the Examination of Persons presented.

The bishop, as a spiritual judge, may refuse a presentee, on account either of personal disqualifications, as, for instance, his being under age, or a layman, or on account of his conversation being criminosus, or on account of his lack of ability (*Specot's Case*, 5 Co. 58; *Albany v. Bishop of St. Asaph*, Cro. Eliz. 119). Unless the cause of refusal be for some crime of temporal cognizance, notice of his refusal of the presentee should be given by the bishop to the patron, and if a suit on account thereof should be brought against the bishop, he should state the cause of his refusal (whether it be temporal or spiritual), specially and directly, so that it may be properly tried.

216; *Booton v. The Bishop of Rochester*, Hutt. 24; *Beverley v. The Archbishop of Canterbury*, Owen's Rep. 3; *Bishop of Lincoln's Case*, Ib. 5); if, however, the clerk died, or was deprived or resigned, before presentation of another by the crown, as its right was to one turn only, which in that case would have been exhausted, the patron may then present and not the crown. *Beverley v. Cornwall*, Cro. Eliz. 44; *Cumber v. The Bishop of Chichester*, Cro. Jac. 216; *The King v. The Archbishop of Armagh*, 2 Str. 842; *The King v. The Bishop of Winton*, Cro. Jac. 53; *The Queen v. The Bishop of Norwich*, 4 Leon. 217; *Starkey v. Pool*, 1 Bulst. 28.

Where the crown is patron there is no lapse, but it seems that if the crown do not present, either when patron, or in case of a lapse, the ordinary may send a deputy to serve the cure, and sequester the profits of the church. Doctor and Student, Ch. 36, 219; Mirehouse, Advows. 176.

VIII. *Descendible Properties and other Incidents of Advowsons.*

Advowsons are descendible in the same mode as freeholds of inheritance at common law (see post, note to *Edward Seymour's Case*). Formerly, where the advowson was in gross, the descent was to be traced from the person who last exercised the right of presentation (Co. Litt. 15 b); where the advowson was appendant or appurtenant to a manor, from the person who was last seised of the manor (Ib. n. 1, Hal. MSS.). Where, however, the death of the ancestor takes place subsequently to the year 1833, the descent must be traced from the *purchaser*. 3 & 4 Will. 4, c. 106, ss. 1, 2.

The advowson of a married woman having issue by her husband, who might inherit it, will on her death belong to her husband for his life as tenant by the curtesy, and he will consequently have the right to present upon a vacancy occurring (Co. Litt. 29 a; ante, pp. 38, 39); so likewise the advowson of the husband will be liable to the dower (if it be not barred) of his widow, which however is not very valuable, as it is merely the third presentation, which occurs after the death of her husband. Co. Litt. 32 a, 32 b, n. 2; ante, p. 53.

IX. *Title to Advowsons and next Presentations by Purchase—when Legal, when Simoniacal.*

Sale of Advowsons.

As an advowson, in addition to being a spirituality, is also temporal property, it will be assets in the hands of the heir (*Westfaling v. Westfaling*, 3 Atk. 464; Co. Litt. 17 b, 374 b). It may be sold, where the circumstances attending the sale do not bring it within the regulations against simony.

By simony is meant the corrupt presentation of any one to an ecclesiastical benefice for money, gift or reward, which has from an early period been condemned by many ecclesiastical canons; but inasmuch as the canon law, at any rate after the Reformation, was of no avail against the laity, the

legislature attempted to repress the evil. By 31 Eliz. c. 6, it is enacted, "that if any person shall for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical, or give or bestow the same" for such corrupt consideration, then such presentation, &c. shall be utterly void, and the Crown may present for that turn. A penalty is then imposed upon the parties, of "double the value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical," and the party seeking, &c. is disabled from enjoying the same; s. 5. The fraudulent admission, institution, installation, induction and investment, &c. of any person in or to any benefice with cure of souls, &c. is then declared void, and penalties imposed upon the parties, s. 6; as also for the corrupt resignation or exchange of a benefice with a cure of souls, s. 8; and ecclesiastical penalties are not taken away by the statute, s. 9.

The purchase of an *advowson in fee*, even if the incumbent to the knowledge of both the parties be in a dying state, is not simoniacal, if it be without the privity of the clerk afterwards presented, and with no view to his nomination. See *Barret v. Glubb*, 2 Black. 1082; *Greenwood v. Bishop of London*, 5 Taunt. 745; *Fox v. Bishop of Chester*, ante, p. 134; *Alston v. Atlay*, 6 Nev. & Man. 686.

If, however, the purchaser (ante, p. 148) received any promise or reward for the presentation it would clearly come within the terms of the act. So if some other person had received a reward for him, and was to account to him for it, or if the person presented, or some one in his behalf, was the real purchaser, this, as laid down in the principal case, would be a fraud on the act of 31 Eliz. c. 6, and would avoid the contract. *Ib.*

If the perpetual advowson be sold when the church is *void* the next presentation will not pass (*Bishop of Lincoln v. Wolferstan*, 1 Black. 490; 2 Wils. 174; 3 Burr. 1504); and if the presentation (ante, p. 145) only be sold the sale is altogether void (*Ib.*).

Sale of next Presentation.

The sale of a next presentation during a *vacancy* is void as simoniacal (*Baker v. Rogers*, Cro. Eliz. 788; Moore, 914); but if the church be full the sale will be valid, although the incumbent be in extremis (see the Principal Case, p. 147), unless the purchase be made with the intention of presenting a particular person; and if upon a vacancy taking place such person is presented, the transaction will be considered corrupt and simoniacal, and consequently void (*Kitchin v. Culvert*, Lane, 102; *Winchombe v. Pulleston*, Noy, 25; Godb. 390), even, it seems, although the purchase may have been made by a father, with the intention of providing for his son (*Win-*

chombe v. Pulleston, Noy, 25, overruling *Smith v. Shelbourn*, Cro. Eliz. 685).

And the legislature has disabled a person from purchasing the next presentation for himself; for by the statute 12 Anne, st. 2, c. 12, it is enacted, "that if any person shall for money, reward, gift, profit or advantage, or for or by reason of any promise, agreement, grant, bond or other assurance, of or for any money, reward, gift, profit or benefit, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure or accept the next avoidance of or presentation to any benefice, and shall be presented or collated thereupon, that every such presentation or collation shall be utterly void, and of no effect in law; and such agreement shall be deemed a simoniacal contract; and it shall be lawful for the crown to present or collate unto such benefice for that one time or turn only; and the person so corruptly taking, procuring or accepting such benefice, shall from thenceforth be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain or penalty prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice had become vacant."

Simony.

If a corrupt contract be made for money to present a person to a benefice, even if it be between strangers (*Banderoke v. Machaller*, Cro. Car. 331; 1 Sid. 329; *Rex v. Bishop of Norwich*, 3 Lev. 337), or with the wife of the patron, even if he be not privy thereto (*Roy v. L'Evesq. de Norwich*, 1 Roll. Rep. 233; *S. C.* Cro. Jac. 385); or if a person be presented gratis, after a contract to be presented for money, the presentation will be void as being within the statute; for a clerk who at one time intended to procure the benefice corruptly, cannot but be deemed an unfit person to hold it. *Kitchin v. Calvert*, Lane, 103.

A covenant by the father of a woman about to marry a clerk, in consideration of the marriage to procure him presentation to a certain church when void, will be simoniacal (*Byrt v. Manning*, Cro. Car. 425); secus if it be a distinct and independent covenant without any apparent consideration (Ib.).

Where a father had given a bond to his son, for securing to him an annuity until he should be in possession of a living of a given value, and the son signed an agreement, declaring that he would take holy orders and accept such living as soon as it could be procured for him; Lord Eldon expressed great doubts whether such bond was not void, but the case was decided upon other grounds. *Kircudbright v. Kircudbright*, 8 Ves. 53.

An agreement to pay an annuity to the widow of the last incumbent, or to his son as long as he should be at the University and unpreferred, has been held valid, though it is difficult to see upon what grounds. *Baker v. Mounford*, Noy, 142.

A bond, with a condition that the incumbent should not be absent eighty

days in the year from his living, has been held not simoniacal as being a lawful condition. *Carey v. Yeo*, 7 Bac. Abr. 236.

A person will not be allowed to evade the statute by any underhand agreement. Thus where a second brother, having a right to present, made a corrupt contract to present a certain person, but in order to evade the provisions of the statute surrendered the right of presenting to his elder brother, and the latter not being privy to the contract presented the person who pursuant thereto was to be presented, it was held that the corrupt contract was an offence within the statute, and that its being performed by an innocent person made no alteration in the case. *Calvert v. Kitchin*, Lane, 73. See also *Baker v. Rogers*, Cro. Eliz. 788; *Booth v. Potter*, Cro. Jac. 533.

A corrupt presentation by a person *usurping* the right to present is within the statute. 3 Inst. 153; *Walker v. Hammersly*, 3 Lev. 115.

A donative has been held to be within the meaning, although not within the express words of the statute of 31 Elizabeth, c. 6. Thus, where a person agreed to give another a sum of money if he should procure him to be presented by the king to the church in the Tower of London, being a donative of the king's donation; it was held, that the transaction was simoniacal, "because it was within an equal mischief, against which the statute provides, and so within the remedy thereof." *Bawderok v. Mackaller*, Cro. Car. 330.

Where simoniacal presentation has been made, the patron will forfeit double the value of one year's profit of the benefice (ante, p. 160); and all right to the revenues being taken away, any parties sued by the presentee, except where the relation of landlord and tenant has been established between them (*Cooke v. Loxley*, 5 T. R. 4; *Brooksby v. Watts*, 6 Taunt. 333; 2 Marsh. 38), may plead, him no parson, because of the simony (Hob. 168), and the offence is not remitted by a general pardon. Sid. 170.

The presentation, moreover, will be void, and the crown may present for that turn (ante, p. 160; *Greenwood v. The Bishop of London*, 5 Taunt. 727), and the clerk who had been simoniacally promoted, can never be presented to the same living again. Ante, p. 161; *Booth v. Potter*, Cro. Jac. 533; 2 Roll. Rep. 465.

If the simoniacal contract were made without the privity of the presentee, the presentation will nevertheless be void, and devolve pro hac vice from the patron to the crown (*Booth v. Potter*, Cro. Jac. 533; *Baker v. Rogers*, Cro. Eliz. 788; *Hutchinson's Case*, 12 Rep. 74, 101; *Bawderok v. Mackaller*, Cro. Car. 330; *The King v. The Bishop of Norwich*, Cro. Jac. 385; 3 Lev. 337); in such case, however, the presentee is not within the clause of disability in the statute, he might therefore take the same benefice under a new presentation from the crown. *Doctor Hutchinson's Case*, 12 Rep. 101; 3 Inst. 154.

X. Bonds of Resignation when valid.

Bonds of resignation given to the patron, by a person about to be presented

to a benefice, may be either general or special. By the former, the obligor binds himself in a penalty to resign the living on the request of the patron, generally; by the latter, in favour of any particular person or persons.

At one time the cases seem to have decided that *general* resignation bonds, upon the face of them good, were not to be avoided except by a plea showing them to have been originally made upon some corrupt contract not appearing therein, or that an ill use was endeavoured to be made of them, by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a Court of Equity for an injunction to restrain their being put in suit; 1 Bligh, N. S. 148; it was however held, in the House of Lords in the leading case of *The Bishop of London v. Ffytche* (2 Bro. P. C. 211, Toml. Ed., best reported, Cunn. Sim. 52), that general resignation bonds were void.

Subsequently it was determined, that a special bond to resign in favour of one of two particular persons was invalid. See *Fletcher v. Lord Sondes*, 1 Bligh, N. S. 144, where a clerk gave to the patron of a rectory a bond, in which, after a recital, that the patron had, by an instrument of the same date, presented the clerk, who had agreed to resign upon request of the patron, or of the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding, there was a condition that the bond should be void on the resignation of the clerk, upon the request of the patron, so that he might be able to present one of his two brothers, it was held by the House of Lords (reversing the judgment of the Court of King's Bench and Exchequer Chamber, 5 B. & Ald. 835), that the bond was simoniacal and void, upon the ground that such an agreement was a benefit to the patron, and contrary to the statute 31 Eliz. c. 6.

In consequence of many patrons and incumbents having acted under an erroneous impression of the law, and thus exposed themselves to severe penalties, 7 & 8 Geo. 4, c. 25 (the object of which is purely retrospective), was passed, giving validity to engagements made before 9 April, 1827, for resignation in favour of one of two persons specially named.

Afterwards, by 9 Geo. 4, c. 94, an engagement before presentation, nomination, collation or appointment, to resign a benefice in favour of one person or one of two persons specially named and described therein, was made valid (s. 1), provided that where *two* persons are named, each shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew or grand-nephew of the patron, or of one of the patrons, not being merely a trustee or trustees of the patronage, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or one of the persons by whose direction such presentation, &c. shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons, or of any other person in whose right such presentation, &c. shall be intended to be made (s. 2); presentations, &c. will be valid under such engagements (s. 3), if deposited within two months with the registrar of the diocese or peculiar jurisdiction where the benefice

is (s. 4); and the resignation must state the engagement, and the name of the person for whose benefit it is made, and it will be void unless the person be presented within six months (s. 5). The act only extends to persons entitled to patronage as private property (s. 6).

It is to be regretted, that such an act should have been passed by the legislature, though we may not feel surprised, since so many of its members were interested in considering the presentation to advowsons to be a right to be exercised for their own private advantage, rather than a sacred trust to be exercised for the good of the people. One great objection on the ground of general policy to such bonds is thus stated by Hullock, B. "The patron," he observes, "becomes thereby precluded from choosing the most proper individual for supplying the living. If he act in the presentation according to the condition of the bond, his choice is fixed long before the fitness of the object can be ascertained. At the execution of the bond the nominee may be at college, or, perhaps, at school, or, perhaps, in his cradle." 1 Bligh, N. S., 190. Still more forcible is the language of Garrow, B., who says, "It appears to me to be essential to the best interests of the community, to its religion and morals, and to the character of that useful and honourable class of men,—the parochial clergy, that from the moment of induction to their livings, they should be, during their incumbency, perfectly free and independent. To place them in any respect or degree under the control of any person whatsoever, except their ecclesiastical head, to whom they are accountable for their conduct, would be very much to diminish their usefulness, and to introduce mischiefs only in some degree less than would be occasioned by their absolute dependance upon their patron under general bonds of resignation." 1 Bligh, N. S., 191.

XI. *Title to Advowsons by Prescription.*

It may be here mentioned, that by the Statute of Limitations, 3 & 4 Will. 4, c. 27, no advowson can be recovered after three adverse incumbencies if they amount to the period of sixty years; if they do not, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years (s. 30). Incumbencies after lapse are to be reckoned within the period, but not incumbencies after promotions to bishoprics (s. 31); but after the expiration of 100 years from the time at which adverse possession of the benefice shall have been obtained, no action or suit can be brought (s. 33).

XII. *On the several Remedies relative to Advowsons.*

The only action by which a right of presentation can now be tried is by a *quare impedit*, as the writ of right of advowson, and *assize of darrein presentment* have been abolished by 3 & 4 Will. 4, c. 27, s. 36; see *Tyrell v. Jenner*, 6 Bing. 283.

Where, however, a clerk is duly inducted, he may maintain an ejection against one in possession whose induction is void under 31 Eliz. c. 6. *Doe v. Fletcher*, 8 B. & C. 25.

WILLIAM CLUN'S CASE (a).

*Mich. Jac. 1, entered Termino Sanctæ Trin., Ann. 10 Jac. 1. Rot. 664,
in B. R.*

[REPORTED 10 Co. 126 a.]

RENTS—APPORTIONMENT.]—*Rent upon a lease for 50 years, if the lessor should so long live, was reserved payable at the four usual feasts, or within thirteen weeks after. After Lady-day, but within thirteen weeks, the lessor died. Her executor brought debt against the lessee for the rent due at Lady-day:—Held, upon demurrer, the action is not maintainable.*

The first reason of the resolution.—Because the disjunctive is added for the benefit of the lessee.

The second reason.—After non-payment of the rent on the first day, it is the same in law as if it had been reserved on the second day only. When no election remains, it is the same in law as if none had ever existed.

Third reason.—The rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee; so that if the land is evicted, or the lease determined, before the time of payment, there shall be no apportionment of the rent.

There are four times of payment of rent issuing out of land:—1st. Voluntary and not satisfactory; 2nd. Voluntary and satisfactory to some purposes; 3rd. Satisfactory and not coercive; 4th. Satisfactory and coercive.

If rent be reserved on a lease for years made by tenant in fee, payable at a certain day or within a month after, the lessor dies after the day but within the month, the heir shall have the rent as incident to the reversion; the law is the same upon a grant of the reversion between the two days.

If there be a lease for years, rendering rent at a certain day or one month after, with condition of re-entry, tender of the rent at the day

(a) *Clun v. Archer*, S. C. Cro. Jac. 309; 4 Leon. 247.

saves the term. If the lessor dies between the two days, the heir shall have the rent.

WILLIAM CLUN, executor of Anne Breather, was plaintiff against Henry Archer, defendant, and demanded 9*l.* debt, and declared that the said Anne Breather, 26th Nov., anno 3 Jacobi Regis, by indenture of the same date demised to the said Henry one messuage, two mills, one garden, and divers lands in Coopersale, in Essex, from the feast of St Michael the Archangel then last past, for fifty years, if the said Anne should so long live, reddendo et solvendo pro omnibus prædict. præmissis præfat' Annæ Breather, executor' et assignatis suis, annuatim et quolibet anno durante continuatione dimissionis prædict', ad domum mansionalem Johannis Archer in Witham præd', plenariam summam trigint' et sex librarum bonæ et legalis monetæ Angl' ad quatuor festa sive terminos in anno usualia, viz. festa nativitatis Dom' Jesu Christ', Annunciationis beatæ Mariæ Virginis, nativitat' Sancti Joh' Bapt' et Sancti Mich. Archangeli, *vel infra tresdecem septimanas proxim'* post quemlibet præd' dierum festival', per æquas et æquales portion'; by force of which the said Henry Archer entered into the said tenements, and had and held them usque ad et post fest' Annunciationis beatæ Mariæ Virginis, anno regni Regis nunc 9, sc. usque 2 diem Aprilis anno 9 supradicto, quo quidem 2 die Aprilis prædict' Anna apud Coopersale prædict' obiit; and for 9*l.* for the quarter due at the feast of the Annunciation anno 9 supradicto, he brought this action, upon which declaration the defendant demurred in law.

This case was often argued at bar, and now this term it was argued by the Justices Houghton, Dodderidge, Croke, and the Chief Justice; and it was resolved, that the action of debt was not (a) maintainable: and because duo sunt instrumenta ad omnes res confirmandas et impugnand', ratio et autoritas: first, I will report the reasons of this resolution, and then divers authorities in the point.

And three reasons of this resolution were shown. 1. Because the (b) disjunctive is added for the benefit of the lessee, and it is more for his benefit to have the last day, in which case there are two days of payment, one voluntary, and that at the election and liberty of the lessee to pay it at the days of the said feasts; the other day of payment is

(a) 4 Leon. 247; Cro. Jac. 310.

(b) Cro. Jac. 310; 5 Co. 22 a; 1 Roll. 450; Cro. Eliz. 380; Cro. Jac. 500.

at the end of the thirteen weeks after, and that is the(c) extreme and legal time; and therefore, forasmuch as the said Anne Breather died before the extreme and legal time, the lessee(d) is discharged of the rent by the act of God for the same quarter. Vide *Hill and Grange's Case*, Plo. Com. 172, 173, the most extreme time is the legal time.

And it is to be known, that in case of payment of rent issuing out of land there are four times of payment, the first time of payment voluntary and not satisfactory, and yet good to some special purposes. The second voluntary, and in case satisfactory, and in case not. The third legal and satisfactory, absolutely and not coercive. The fourth legal, satisfactory and coercive.

As to the first, if the lessee, donee or tenant pay his rent before the day, it is voluntary(e) and not satisfactory(f), for the cause rendered in the third reason: but if it be paid in the name of seisin of the rent, although it shall not(g) enure by way of satisfaction, yet it shall give a sufficient seisin to this purpose to have his assize or other remedy, for the law takes delight in giving remedy; and therewith agrees Lit. cap. Attornment, 127b; vide (25) 45 E. 3, 44b; 49 E. 3, 15; 15 E. 3; "Execution," 63; 37 H. 6, 33; 39 H. 6, 36; 5 E. 4, 2.

As to the second, if the rent is payable at the feast of Easter, if the tenant pays the rent in the morning and the lessor dies at two hours before noon of the same day: this payment was voluntary, and yet it is a good satisfaction against the heir(h), but not against the(i) King, 44 E. 3, 3b.

As to the third, legal time is a convenient time before(j) the last instant of the day, which is the most extreme time, and is satisfactory and not coercive; for till the end of the day no remedy is given by the law, 21 H. 6, 40 a(k).

As to the fourth, that is when the rent is due and in arrear, and therefore it is well said by the poet(l),

*Judicis officium est ut res, ita tempora rerum
Quærere, quæsito tempore tutus eris.*

(c) Cro. Jac. 227, 233, 423, 500; 5 Co. 114 b; Co. Litt. 202 a.

(d) Cro. Eliz. 380; Cro. Jac. 228; 10 Co. 128 a.

(e) 1 Roll. Rep. 390.

(f) Therefore if there be a condition of re-entry in the lease for nonpayment of rent, rent paid before the day will not save the condition, if, on demand, it be not paid at the day. *Lord Cromwell v. Andrews*, Cro. Eliz. 15. But it seems that such a payment would in equity be deemed satisfactory. See *Lord Rockingham v. Penrice*, 1

Swanst. 346, note to *Ex parte Smyth*.

(g) 4 Co. 10 a, and ref. Ib.

(h) *Lord Rockingham v. Penrice*, 1 Swanst. 346. Sed vide *S. C.* 1 P. Wms. 177; *Salk.* 578, reported differently.

(i) Brownl. 106; *Hard.* 24; *Yelv.* 167.

(j) Co. Litt. 202 a; Cro. Jac. 423, 500; 5 Co. 114 b.

(k) See *Tinckler v. Prentice*, 4 Taunt. 549; note to *Ex parte Smyth*, 1 Swanst. 343.

(l) 10 Co. 82 a; Co. Litt. 171 a; 3 Bulst. 170.

The second reason was, when the lessee doth not make (*m*) payment at the first day according to his election, then the rent is absolutely due at the second day, and the second day is as well parcel of the reservation as the first day, and therefore after the non-payment at the first, it is now upon the matter as much in law, as if it had been reserved (*n*) at the second day only, for when the whole election is past, as in 17 El. 344. If (*o*) a man by deed grants a rent-charge to one and his heirs, and doth not say, for him and his heirs, and dies, now the time of election to make it an annuity is past; and therefore if the grantee brings a writ of annuity against the heir (*p*), it shall not discharge the land, because when no election remains, it is as much in law, as if there never had been any election; and therefore upon the books in 43 E. 3, Bar. 194; 44 E. 3, 32; 15 E. 3, Execut. 63; 5 E. 2, 2. This case was put, if one, 1 Octob., makes a lease for years, or for life, or a gift in tail, yeilding by the year a pair of gilt spurs at the feast of Easter, or twenty shillings at the feast of St. Michael the Archangel: in this case if the lessee doth not pay the spurs at the feast of Easter, nothing is due till the feast of St. Michael.

The third reason was, because the rent reserved is to be raised out of the profits of the land, and is not due until the profits are taken by the lessee: for these words (*q*) "*reddendo inde, or reservando inde,*" is as much as to say, that the lessee shall pay so much of the issues and profits at such days to the lessor, for (*r*) *reddere inde nihil aliud est quam acceptum restituere, seu reddere est quasi retro dare, and redditus dicitur a reddendo, quia retro it, sc. to the lessor, donor, &c. sicut provent' a proveniendo; and obventus ab obveniendo.* And that is the reason that the rent so reserved is not due or payable before the day of payment incurred, because it is to be rendered and restored out of the issues and profits; and that is the reason, that if the land is (*s*) evicted, or if the lease determines before the legal time of payment, no rent shall be paid, for there *shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the*

(*m*) Roll. Rep. 390.

(*n*) 4 Leon. 19; 1 And. 9.

(*o*) Dy. 344, pl. 2; Poph. 87; Co. Litt. 144 b; 1 Roll. 226; Hob. 58; Plowd. 457 a; Br. "Estate," 65; Br. "Annuity," 13; Fitz. "Ann." 16; 2 H. 4, 13 a.

(*p*) "This seems a mistake; for if a man grants a rent in fee, without saying

for him and his heirs, his heirs cannot be charged in an annuity. Vin. Abr. "Annuity, B, pl. 2."—*Note in Serjeant Hill's Copy.*

(*q*) Co. Litt. 141 b.

(*r*) Palm. 481.

(*s*) Co. Litt. 292 b; Cro. Jac. 310; 3 Co. 22 a; Dyer, 56, pl. 15; Plowd. 134 b.

land (*t*); and therefore if tenant for life makes a lease for years, rendering rent at the feast of Easter, and the lessee occupies for three quarters of the year, and in the last quarter before the feast of Easter the tenant for life (*u*) dies, here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of Easter, and no apportionment shall be in respect of time; but in the same case, if part of the land had been (*v*) evicted before the feast of Easter, and the feast of Easter incurred in the life of the lessor, there shall be an apportionment of the rent, but not in respect of the time which well continued, but in respect that parcel of the land leased is evicted (*w*).

And this difference appears in our books, 27 E. 3, 84 b. In (*x*) debt against executors, declaring that their testator granted him a pension of 20*l.* to remain with him in the king's wars at the time that he should be reasonably warned, to take at four times of the year equally; and showing further, that he went with him to Calais by the warning of their testator, and was there armed; and demanded judgment and prayed his debt. To which the defendant said, that for the first quarter he was paid 5*l.*, and showed forth an acquittance, and before the second quarter ended the testator died, and demanded judgment of the action. And Mowbray of counsel with the plaintiff moved, since you do not deny the pension to be granted as one entire by the year upon a condition which we have performed, *sc.* that we have remained with him, we prayed the debt: but Wilby, Chief Justice, by the rule of the court, awarded that the plaintiff should take nothing by his writ, because there should be no apportionment in respect of part of the time, although it happened by the act of God. Vide 10 E. 4, 18; 20 H. 6, 6; 9 E. 4, 1; 30 H. 8; Br. Apportionm. 7.

If I am bound to you by bond of 20*l.* to be paid at four usual feasts of the year by equal portions, the obligee shall not have an action of debt before all the terms incurred. The same law of a contract (*y*): but if a rent is reserved on a lease for years, at four usual feasts of the year, the lessor shall have an action of debt after the first day, and shall not stay till the whole is due, because it is accounted in law as a reservation of parcel of the issues and profits of the land, which is no debt before the day, as in the said case of a bond or contract; and that is the true

(*t*) Co. Litt. 148 b; but see now 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22.

(*u*) Cro. Jac. 228; Cro. Eliz. 380.

(*v*) Co. Litt. 148 b.

(*w*) See now 11 Geo. 2, c. 19, s. 15.

(*x*) Fitz. "Det." 140.

(*y*) *Walker's Case*, 2 Co. 59, 60.

difference betwixt the case of the bond and a rent reserved on a lease for years in Litt. 117 b; vide F. N. B. 267; and not a difference betwixt a recognizance of a debt payable at several days, for that is not like a bond, but a rent reserved on a lease for years. Vide 3 Mar. (z) Dyer. 103. Another difference betwixt a covenant or promise and a contract or bond. Vide 5 Mar. *Action sur le Case*, Br. 108, 10 E. 2, "Execut." 137, and 16 E. 2, *ibid.* 138; vide 9 E. 3, 7, for authorities in the point.

I have seen a report of a case, Mich. 34 H. 8, in the time of Baldwin, Chief Justice of the Common Pleas, that it was the opinion of all the justices, that if a man seised of land in fee, 1 *die Octob.*, makes a lease of the same land for ten years, from the feast of St. Michael then last past, yielding to him and his heirs the yearly rent of 20*l.* at the feast of St. Michael the Archangel, or within one month after; that in this case, if the lessor dies between the feast of St. Michael and the end of the month, that the (a) heir shall have the rent as incident to the reversion, and not the executors as rent behind, because it was not due till the end of the month. The same law if the lessor betwixt the said two days had granted the reversion over, and the tenant attorned, the (b) grantee should have the rent as incident to the reversion.

And Mich. 2 & 3 P. & M., Prideaux, Serjeant, moved Montague, Chief Justice, and the other Justices of the Common Pleas, that if a man makes a lease for years, yielding a yearly rent at the feast of Easter, or one month after, with condition of re-entry, and the lessee (c) tendereth the rent at the last instant of the feast of Easter, if the lessor may enter upon demand made at the last instant of the month; and it seemed not, because the lessee had liberty to pay it then; and the difference was taken betwixt the said disjunctive reservation and when the reservation is at a certain feast; and a condition is added that if it be behind by the space of a month after the feast, that then the lessor shall re-enter: there the lessee, for the salvation of his lease, cannot tender it at the last instant of the feast day, because he has not such liberty and election as in the other case. And it was said by the new serjeants, that in the time of the Lord Baldwin, it was resolved by all the justices, that in the said case of the

(z) Dyer, 113, pl. 55; Cro. Car. 241; 4 Co. 94 b; 2 Roll. Rep. 47; Cro. Jac. 505; 8 Co. 153 a.

(a) Cro. Jac. 228, 310; Cro. Eliz. 565, 575; Orph. Leg. 159; 4 Leon. 247; Yelv.

167; 1 Brownl. 106; 3 Keb. 195.

(b) Cro. Jac. 228.

(c) Cro. Eliz. 14, 48, 73; Moor, 122, 223; Plowd. 70 b; Co. Litt. 211 a; 2 Leon. 130; Godb. 38.

disjunctive reservation, if the lessor dies betwixt the two days, the heir shall have the rent, and not the executors, which case the Chief Justice showed in Court, reported by an ancient and learned benchet of the Inner Temple, Trin. 31 El., in the King's Bench, Rot. 666, betwixt Smith, plaintiff, and Bustard, defendant, where the case was in effect, that Smith leased certain land for years, yielding yearly a rent of 35*l.* at the feasts of St. Michael and the Annunciation of our Lady, or within twelve days after each of the said feasts, payable at the font stone in the Temple Church, upon condition that if the said rent of 35*l.*, or any part of it, be behind and not paid "per præd' spatium 12 dier' prox' post aliquod præd' festorum seu dierum solutionis inde prout supradict' est," that then the said lease should be void; and it was adjudged, that the lessee, in safeguard of his lease, should have twelve days (*d*) after the first twelve days to pay the said rent, for when the rent is not paid at the first day, it is as much as if it had been reserved upon the twelfth day after: and where it is said, "per præd' spatium 12 dierum post," &c., by good construction all the words ought to take effect, *sc.* post aliquod præd' festor' seu dierum solutionis inde;" and dies solutionis is the twelfth day after the feast, and, therefore, the lessee shall have twelve days after the twelfth day, which is "dies solutionis post festum," &c., and that for the lessee's greater advantage, for whose benefit further time was given; and these words, "prædict' spatium 12 dierum," stand right in good sense, *sc.* per prædict' spatium 12 dierum post prædict' 12 dies, for that is prædict' spatium, although they have not the same beginning as the other have.

And so the *quære* in 3 & 4 P. & M. 142, was well resolved and adjudged, Trin. 30 Eliz., in Communi Banco, inter (*e*) Pilkington and Dalton. The case was, a parson of a rectory made a lease for years, rendering rent at the feast of St. Michael, or within one month after; the lessor died ten days after the feast of St. Michael, and the plaintiff was barred by the judgment of the Court, because the lessor (*f*) died before the rent was due.

Pâsch., 40 El., in the King's Bench, the case was, the Lady Elizabeth Pawlet, late the wife of Chedwick Lord Pawlet, seised of the manor of Wade in the county of Southampton for her life, by deed

(*d*) Dy. 17, pl. 88, 97, pl. 104, 142, pl. 50; Plowd. 172 b; Dy. 142, pl. 50.
(*e*) Swinh. 323; 3 Keb. 47.

(*f*) Cro. Eliz. 380; Cro. Jac. 227, 233, 311; 1 Bulst. 1, 2; 1 Brownl. 105; 2 Brownl. 220; Yelv. 167.

indented leased the said manor to William Pawlet for ninety-nine years, if the said Dame Elizabeth should so long live, yielding the yearly rent of 100*l.* at the feasts of St. Michael the Archangel and the Annunciation of our Lady, or within forty days after each of the said feasts. William Pawlet made Dulcibel his wife executrix, and died; Dulcibel took to husband John Moor, Esq. The Lady Elizabeth Pawlet made Ed. Walgrave her executor, and died the 13th day after the feast of St. Michael; her executor brought an action of debt for the half-year ended at the feast of St. Michael, before the death of the Lady Elizabeth, and tota curia contra querentem; but by entreaty of some of the justices, John Moor gave the plaintiff 10*l.*

And in the case at bar judgment was given, quod querens nihil capiat per billam (g).

Clun's Case is often cited as a leading authority for the common law upon the subject of rents, a species of incorporeal hereditaments of great importance, the rules regulating which ought to be, but certainly are not, simple and uncomplicated.

This is the consequence of the doctrines at common law, which, having their origin in feudal times, are by no means calculated to meet with the requirements of a different state of society; and although the legislature by its interference has upon many occasions effected a partial good, it has never attempted to regulate the subject as a *whole*, or to deal with it in a manner worthy of an enlightened system of jurisprudence.

In examining the subject of rents it is proposed to consider, I. What constitutes a rent and its different kinds; II. How rents may be reserved or made payable; III. What estate may be had in a rent; IV. The payment of rents; V. The remedies for enforcing their payment; VI. Remedies against wrongful proceedings to obtain payment of rents; VII. The extinguishment of rents.

I. *What constitutes a Rent and its different kinds.*

A rent may be defined generally to be a fixed tribute, which issues out of land as part of its actual or possible profits. Burt. Comp. 1053. Rents are of three kinds: 1. Rent Service; 2. A Rent Charge; and 3. Rent Seck.

1. *What constitutes a Rent Service.*

A rent service has been defined "as an annual return made by the tenant, either in labour, money or provisions, in retribution for the land that passes." Gilb. on Rents, 9.

A rent service is so called because, being connected with tenure, it is ac-

accompanied with some corporal service, as fealty at least, as where it is due from a tenant to the lord of a manor or other chief lord of the fee (Litt. s. 122; Co. Litt. 87 b; 7 Q. B. 978), or from a lessee to the reversioner; as if land be let by A. to B. for a term in consideration of his paying him a rent of 10*l.*, in this case A. is the reversioner and the rent of 10*l.* is a rent service, and fealty is also due, though it be not now demanded. In all these cases the common law gives as incident to the reversion a right of distress, that is to say of taking the goods of the tenant upon nonpayment of the rent. Co. Litt. 142 a.

The right of distraining seems to have originated as follows: when the tenant did not perform the feudal service due to his lord, he might have been punished by the forfeiture of his estate. But these feudal forfeitures were afterwards turned into distresses, according to the pignory method of the civil law; that is to say, the land set out to the tenant was *hypothecated*, or as a pledge in his hands to answer the rent agreed to be paid to the landlord; and the whole profits arising from the land were liable to the lord's seizure for the payment and satisfaction of it. Gilbert on Rents, 4. Afterwards the severity of the law came to be mitigated to a seizure of every thing found on the land, and the *distress* was substituted for the *seizure* of the feud, so that we may easily account for the fact that the power of distraining always attended the fealty, and was inseparably incident to the reversion; for as fealty could not have been demanded by a stranger from the tenant, nor consequently any forfeiture have been incurred by a refusal of it, so likewise a stranger could not distrain the goods of another person's tenant for nonpayment of rent. Thus if the lord granted to a stranger a rent which he had reserved from the tenant (which is in fact a rent seck), the stranger could not distrain for it, as he could not have taken advantage of a forfeiture of the land, for if he could have done so the land would have been liable to two different seizures at different times. Ib. 5, 6.

2. What constitutes a Rent Charge.

A rent charge is where by deed or will one person confers upon another a rent issuing out of lands either for a limited or absolute interest, together with a power of distress to recover such rent. Litt. s. 218.

Although a rent granted for equality of partition by one coparcener to another is not a rent service, because there is no tenure between the parties, inasmuch as it would be unreasonable that the coparcener who has parted with a share of the inheritance in lieu of the rent should not have a good security for its payment, the law, in order to encourage such partitions, has construed such rent a *rent charge of common right*, and has given a power of distress for the recovery of it. Litt. s. 251, 252; Gilb. on Rents, 19.

Upon the same principle where a rent is granted for equality of exchange, or to a widow in lieu of dower, it will be considered as a rent charge, having, as incident thereto of common right, a power of distress. Co. Litt. 169; Gilb. on Rents, 20.

3. *What constitutes a Rent Seck.*

A rent seck or *redditus siccus* is, first, where either a rent has been conferred by deed or will by one person upon another *without a power of distress*, in which case, not having the reversion or any right by reason of tenure, he could not at *common law* recover rent by distress (Litt. s. 218); or, secondly, where the rent was originally rent service, but subsequently was separated from the seignory or reversion. Burt. Comp. 1056. There are rents called *rents of assize*, or certain rents at which freeholders or copyholders of a manor have held under the lord from time immemorial, and *chief rents*, similar rents paid by freeholders, both of which are sometimes called *quit rents*. 2 Inst. 19; 1 Steph. Comm. 650. All these rents are now, as well as rents seck, made recoverable by distress; for by the 5th section of 4 Geo. 2, c. 28, it is enacted, "that all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rent seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years within the space of twenty years, before the first day of this session of parliament, or shall be hereafter created, as in case of rent reserved upon lease, any law or usage to the contrary notwithstanding."

Unless the case is brought within this section of the act, a rent seck cannot be recovered by distress. *Bradbury v. Wright*, Doug. 627.

It is not however necessary that the three years there mentioned, during which the rents must have been paid in order to give the remedy by distress, should be consecutive. *Musgrave v. Emmerson*, 10 Q. B. 326.

All rights to periodical payments, not issuing out of land, as they are merely personal, although they may be payable to a man and his heirs, are mere annuities. Co. Litt. 2 a; *Aubin v. Daly*, 4 B. & Ald. 59.

II. *How a Rent may be reserved or made payable.*

What may be a Rent.

Although rent is usually reserved or made payable in money, it is not necessarily so, for it may be reserved, according to Coke, "as well in the delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, wheat, or other profit that lieth in render, office, attendance and such like." Co. Litt. 142 a. So, it has been recently determined, that holding lands by the service of keeping up a grindstone for the convenience of a parish (*Doe d. Robinson v. Hinde*, 2 M. & Rob. 441; and see 7 Q. B. 978; see vide Sug. Real Prop. Stat. 61), of cleansing the parish church (*Doe d. Edney v. Benham*, 7 Q. B. 976, 981), or of ringing the church bells at stated hours (*Doe d. Edney v. Billet*, 7 Q. B. 976, 983), without any pecuniary render, is a rent service for the nonperformance of which a distress might be made.

Rent must be either certain, or what can be reduced to a certainty. Co. Litt. 96 a. Thus a man might hold of his lord to shear all the sheep depasturing within his manor, and this reservation is certain enough, because

although the number might vary, yet it might be ascertained by reference to the manor, and the lord might distrain in case the tenant did not render the services reserved. *Ib.* A rent cannot consist of part of the annual profits of the land, as of the vesture or herbage thereof (*Ib.* 142 a), for this would be an *exception* of part of the thing granted, and not a reservation (*Co. Litt.* 47 a; see also *Wickham v. Hawker*, 7 Mees. & W. 63; *Doe d. Douglas v. Lock*, 2 Ad. & E. 705; *The Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940; *Pannell v. Mill*, 3 C. B. 625); though it seems in the case of mines it may consist of a portion of the ore, which is part of the land itself, *Campbell v. Leach*, Amb. 740; *Buckley v. Kenyon*, 10 East, 139; *Rex v. Earl of Pomfret*, 5 M. & S. 139; sed vide *Rex v. Inhabitants of St. Austell*, 5 B. & Ald. 693.

So where a person held land for which he paid 2l. per acre, without reference to the use made of the land, and a royalty of 1s. 6d. for every thousand bricks moulded in one year, it was held by the Court of Queen's Bench, that the royalty, together with the annual fixed charge, was properly considered as the rent. "The objection," said Lord Denman, C. J., "was taken that it was altogether wrong in principle to consider the royalty as rent, and it was mainly founded on this, that it is a sum paid, not in respect of the renewing produce of the land, but of a portion of the land itself, and that not consumed by slow degrees, and to be exhausted at the end of a long period, as is the case with a coal mine, under which circumstances it was admitted that it might be treated as produce, but in such large proportions that the whole would in a few years be exhausted. It does not appear to us that the circumstance of a more or less rapid consumption can make any difference in the principle." *The Queen v. Westbrook*, 10 Q. B. 178, 203.

Out of what Rent may issue.

As a general rule, a rent can only issue out of a corporeal hereditament, inasmuch as, although capable of being demised, no resort by way of distress can, from their nature, be had to incorporeal hereditaments. Thus a rent will not issue out of a right of common or an advowson in gross. *Gilb. on Rents*, 20—23; *Co. Litt.* 47 a, 142 a; 3 *Cruise*, Dig. 275.

Although a sum made payable out of incorporeal hereditaments cannot be sued for as a rent, it may be recovered in an action of debt, as a sum due on a contract. *Jewel's Case*, 5 Co. 3; *Co. Litt.* 47 a.

There are, however, some exceptions to the rule. Thus a rent may be good if reserved out of a reversion or remainder, for, although they are incorporeal hereditaments, they will become corporeal, and a distress may be taken on the determination of the particular estate (*Co. Litt.* 47 a). Upon the same principle, if the lord grants his seignory, reserving rent, the reservation is good, because there is a prospect, though distant, of a remedy by distress upon the escheat of the tenancy. 2 *Roll. Abr.* 446.

So, by statute, rents may be reserved out of incorporeal hereditaments, as in the case of leases of tithes under 5 Geo. 3, c. 17; and a lessee of tithes

is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rentcharge, his remedy being by surrender of *his* lease, under the 88th section of the Tithe Commutation Act (6 & 7 Will. 4, c. 71). *Tasker v. Bullman*, 3 Exch. 351.

The crown, moreover, may reserve rent out of an incorporeal inheritance, because by its prerogative it may distrain on all the lands of its lessee for such rent; and having such remedy for the rent, there is no reason that the reservation should not be good. Co. Litt. 47, n. 284; 7 Bac. Abr. 10, 7th Ed.

A rent may be reserved out of the vesture or herbage of land, because the lessor may go upon the land to distrain the lessee's beasts feeding thereon. Co. Litt. 47 a; 2 Roll. Abr. 446; Gilb. on Rents, 26.

If a rent is reserved out of two things, and one of those things is of such a kind as that rent will not issue therefrom, it will in point of remedy be held to issue wholly out of the other thing. Thus, in *Farewell v. Dickenson*, 6 B. & C. 251, where a demise of a messuage and land together with the furniture, utensils, implements, was proved, it was held by the court of King's Bench, that the rent issued out of the real property and not out of the furniture, and that it was sufficient for the plaintiff to allege and prove a demise of the real property, and, therefore, there was no variance. See also Vin. Abr. "Reservation," O; *Dobitofte v. Curteen*, Cro. Jac. 452; *Emmot v. Cole*, Cro. Eliz. 255.

To whom Rents may be reserved.

As a general rule a rent can only be reserved to the lessor or his heirs, and not to a stranger. Hence it is said by Littleton, "That no rent (which is properly called a rent) can be reserved upon any feoffment, gift or lease, to any person, but to the feoffor, donor or lessor, or their heirs, and in no manner to a stranger." Litt. s. 346. In *Oates v. Frith*, Hob. 130, where a father seised in fee, and his son joined in a lease, to commence after the death of the father, rendering rent to the son, upon the father's death the reservation of rent was held void, even although in the event the son turned out to be heir of the lessor; but if the reservation had been to the lessor and his heirs it would have been good, for though the father would never have had it in his power to demand the rent, the son would have taken it not as purchaser, but as incident to the reversion which he took from his father by descent. Co. Litt. 213 b, n. 1; Ld. Nott. MSS. [note 115]. See also *Doe d. Barber v. Lawrence*, 4 Taunt. 23.

III. *Estate which may be had in a Rent and its Incidents.*

A rentcharge may be limited to a person and his heirs which gives him an estate in fee simple in it. 3 Cruise, Dig. 289.

So a person may be tenant in fee of a rent-service created before the statute Quia Emptores (18 Ed. 1, c. 1); but since that statute a rent-service in fee, which is sometimes termed a fee farm-rent, cannot be reserved, upon a conveyance from one subject to another in fee, because by the operation of

the statute *Quia Emptores* upon a grant of land in fee simple, the grantee holds not of the grantor, but of the person of whom the grantor held, the grantor having no reversion left in him, there is no tenure between him and the grantee: and, consequently, as a rent-service is only incidental to tenure, there is no rent-service (Co. Litt. 144 a, n. 5); it would, however, be considered as a rentcharge for which, under an express power in the grant, a distress might be taken (Ib.), and in the absence of such power it would be considered as a rent-seck, and as such, if brought within the 5th section of 4 Geo. 2, c. 28, by payment for three years, it might be distrained for. *Bradbury v. Wright*, 2 Dougl. 624. These rentcharges in fee simple are not uncommon, especially in the towns of Liverpool and Manchester, where it is the usual practice to dispose of an estate in fee simple in lands for building purposes, in consideration of a rentcharge in fee simple by way of ground rent, to be granted out of the premises to the original owner. Williams, Real Prop. 275.

So there may be an estate tail (Cruise, Dig. 289), an estate for life or pour autre vie, or for years in a rent (Ib.). As to occupancy of a rent, see ante, pp. 32, 33.

A rent in fee or in tail will be subject to the usual incidents to real property, viz. curtesy (Co. Litt. 29 a) and dower (Ib. 32 a), and see ante, pp. 38, 42, and *Chaplin v. Chaplin*, 3 P. Wms. 229.

A rentcharge may be granted in remainder after a limitation to a person for life (*Salter v. Butler*, Yelv. 9), and if granted de novo may, even at common law commence in futuro (Cruise, Dig. 293). A rent, however, in esse or already created, cannot at common law be granted to commence in futuro. Ib.; Gilbert on Rents, 60.

As to rents under the Statute of Uses, see post, note to *Chudleigh's Case*.

IV. *The Payment of Rents.*

With regard to the payment of rents, these considerations naturally arise: —1. Where rent is payable; 2. At what time it becomes due; 3. Its amount, and what deductions may be made therefrom; 4. The mode of its payment; 5. To whom rents are payable, and herein of apportionment.

1. *Where Rent is payable.*

Where a particular place is by contract fixed upon for the payment of the rent, it must of course be paid there. In the absence of contract, the proper place for making the payment is on the demised premises. *Boroughes's Case*, 4 Co. 72 a; *S. C. nom. Burrough v. Taylor*, Mo. 404; Co. Litt. 201 b, 202 a.

2. *At what Time Rent becomes due.*

Rent does not, strictly speaking, become due until *midnight* of the day mentioned for its payment (*Cutting v. Derby*, 2 Bl. 1077; *Leftley v. Mills*, 4 T. R. 173; *Norris v. Harrison*, 2 Madd. 268). Where, however, the landlord desires to take advantage of a condition of re-entry for nonpayment,

or the tenant desires to avoid a forfeiture, the proper time for the demand by the former, and tender by the latter, is *sunset* of the day of payment. Plowd. 172; *Duppa v. Mayo*, 1 Wms. Saund. 287; *Tinckler v. Prentice*, 4 Taunt. 549; *Haldane v. Johnson*, 8 Exch. 694.

It is of much importance for both parties to remember at what time rent becomes due, not only in order that the person demanding it may not by mistake take proceedings prematurely to obtain payment thereof, but also because ignorance of the law on the part of the person who ought to pay it may lead in some cases to a forfeiture of the premises, in others to a payment of the rent to a person not entitled thereto. For instance, if the lessor, being seised in fee, died intestate on the rent day between sunset and midnight, as the rent would not be due until the latter period, (the Apportionment Acts (see post) not applying to such a case,) the *whole* of the rent due since the last rent day would be payable to the heir-at-law, as incident to the reversion which descends to him, and not to the personal representatives of the lessor. *Duppa v. Mayo*, 1 Wms. Saund. 287.

Lord Coke in the principal case has classified what he terms "the times of payment" of rents, he might more accurately have spoken of the result of the payment of rent at different times.

1. If the rent be paid *before* the day, although the receipt thereof be sufficient to give the landlord seisin, if paid for that purpose, yet it is both voluntary and not satisfactory. And it has been held, where rent has been paid *before* the day, although the lessor lived until the day, but died before midnight, that although it was a good payment as to the tenant, yet that the executor of the lessor ought to make the same good to the person entitled to the reversion. *Lord Rockingham v. Penrice*, 1 Swanst. 345, n.

2. If the tenant paid the rent on the morning of the day on which it became due, and the landlord died two hours before noon, although the payment was voluntary, it would be satisfactory as against the heir, to whom the lands descend (*Dibble v. Bonwater*, 2 E. & B. 564), though not as against the crown. 44 E. 3, 3 b.

3. A payment of rent made at the last instant of the day mentioned for payment of the rent, although voluntary, is satisfactory against all persons.

4. After that time the payment of rent is not only satisfactory, but also coercive or liable to be compelled by coercion.

3. *The Amount of Rent, and what Deductions may be made from it.*

The tenant must of course pay the full amount of rent due, unless there are any deductions which he can legally make therefrom. He may, for instance, deduct such taxes and rates which he has, in obedience to the legislature, paid in the first instance, and which are afterwards to be deducted from the rent payable to the lessor, as, for instance, the land-tax (38 Geo. 3, c. 5, s. 17; *Stubbs v. Parsons*, 3 Barn. & Ald. 516), tithe rentcharge (6 & 7 Will. 4, c. 71, s. 80), and income tax (5 & 6 Vict. c. 35, Schedule A, No. 4, Rule 9; see also *Franklin v. Carter*, 1 C. B. 750),

unless he has entered into a contract with the lessor, whereby he takes those payments upon himself. A tenant ought to deduct the property tax in his next payment of rent, for if he omit to do so, he cannot afterwards recover the amount as *money paid* to the use of his landlord. *Cumming v. Bedborough*, 15 Mee. & W. 438.

If the tenant in possession be an underlessee, he may, in order to protect himself from distress on the part of the superior landlord, pay any arrears of rent due from his own lessor, and deduct the sum so paid from his own rent (*Sapsford v. Fletcher*, 4 T. R. 511; *Exall v. Partridge*, 8 T. R. 308; *Taylor v. Zamira*, 6 Taunt. 524; *Johnson v. Jones*, 9 Ad. & Ell. 809; *Wheeler v. Branscombe*, 5 Q. B. 373). The principle upon which the decisions proceed is, that as the landlord, either expressly or by implication, undertakes to protect the tenant in the undisturbed enjoyment of the property demised, he by implication authorizes him to apply his rent due or accruing due for that purpose (*Graham v. Allsopp*, 3 Exch. 186; *Jones v. Morris*, Ib. 742; *Boodle v. Campbell*, 7 Mann. & Gr. 386); and the underlessee may make the payment, upon the superior landlord demanding it, although he may not have threatened to distrain his goods. See *Carter v. Carter*, 5 Bing. 406; *Valpy v. Manley*, 1 C. B. 594. However, a tenant of a mortgagor in possession cannot, in an action brought against him by his landlord for use and occupation, plead a notice from the mortgagee who was entitled to the land during the whole period of occupation, claiming the mesne profits, although he might plead an actual payment upon a demand by the mortgagee. *Wilton v. Dunn*, 17 Q. B. 294.

4. *The Mode of Payment of Rent.*

Like any other payment as between debtor or creditor, rent may be paid either to the landlord himself or to any duly authorized agent (*Owen v. Barrow*, 1 Bos. & Pul. N. R. 101; *Goodland v. Blevith*, 1 Camp. 477; *Wilkinson v. Cundlish*, 5 Exch. 91) by a remittance by post, if authority be given by the landlord, either expressly or by implication, as where the tenant has been accustomed so to remit it. *Warwick v. Noakes*, Peake, 98. As to payment by giving cheques, see *Pearce v. Davis*, 1 M. & Rob. 365; *Hough v. May*, 4 Ad. & Ell. 954.

And although a security, as a bond (1 Roll. Abr. "Debt," "Extinguishment" (A), pl. 2, p. 605), even on account of a judgment debt (*Baker v. Walker*, 14 Mees. & W. 465), or a promissory note or bill of exchange payable at a future day (*Davis v. Gyde*, 2 Ad. & Ell. 623), be given for payment of rent, as the rent ranks as high as a specialty debt (*Willett v. Earle*, 1 Vern. 490; *Gage v. Acton*, Carth. 511; *Thompson v. Thompson*, 9 Price, 471), it will not merge in the security as if it had been a mere simple contract debt, and consequently the landlord's remedy by distress is not suspended by his having taken the security. See 1 Roll. Abr. "Debt," "Extinguishment" (A), pl. 2, p. 605; *Skerry v. Preston*, 2 Chit. 245; *Davis v. Gyde*, 2 Ad. & Ell. 623; *Parrott v. Anderson*, 7 Exch. 93.

5. *To whom Rents are payable, and herein of Apportionment.*

If rent be reserved generally, without saying to whom, the law will give it as incident to the reversion upon the lessor's death intestate, if he be seised in fee, to his heir at law, and, if he have merely a chattel interest, to his executor or administrator. 21 H. 7, 25, pl. 2; *Whitlock's Case*, 8 Co. 71; Gouldsb. 148, pl. 68; *Sacheverel v. Frogate*, 1 Vent. 161; *Bland v. Inman*, Sir W. Jones, 308, 309.

As to the effect of particular forms of reservations of rent, see 2 Platt, Leases, 88.

At common law, as is laid down in the principal case, there is no *apportionment of rent in respect of time*, rent not being held to accrue due like interest *de die in diem*, but only to become payable in the event of the accomplishment of the full period upon the expiration of which it is made payable. The reason given for this, as appears in the principal case, is that the rents are payable out of the issues and profits only; and as no complete perception of the issues and profits for any particular period could take place until its expiration, so (the contract being entire) neither could the rent payable in respect of the issues and profits become due before that time. Thus if the lessor seised in fee, or having a limited interest with a power of leasing, died in the interval between two days of payment, his personal representatives could not claim the rent up to the time of his death, but it would go as incident to the reversion either to the heir at law, devisee or remainderman, as the case might be. *Earl of Strafford v. Lady Wentworth*, Prec. Ch. 555; 1 P. Wms. 180; *Lord Rockingham v. Penrice*, 1 P. Wms. 177; Salk. 578; *Norris v. Harrison*, 2 Madd. 268.

The inconvenience of this rule of common law was shown most strikingly in cases since remedied by the Apportionment Act (11 Geo. 2, c. 19, s. 15), where a person having a limited interest in land as a tenant for life without a power, granted a lease, reserving rent payable half-yearly, and died in the interval between the rent days, the lessee was only bound to pay the rent up to the last rent day, and was not bound to pay any from that time up to the determination of the lease by the death of the tenant for life (*Bar-ricke v. Foster*, Cro. Jac. 227, 228; *Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 502); for the executors of the tenant for life could not bring an action for use and occupation, nor could the remainderman claim the rent, for he was only entitled to what became due during his time. Amb. App. 809, Blunt's Ed.

We may here mention that previous to 4 & 5 Will 4, c. 22 (post, p. 183), annuities (3 Atk. 261) and dividends on monies in the funds were not apportionable (*Wilson v. Harman*, 2 Ves. 672; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502; *Rashleigh v. Master*, 3 Bro. C. C. 101) except when they were due for the maintenance of infants (*Hay v. Palmer*, 2 P. Wms. 501), or of married women living separate from their husbands. *Howell v. Hanforth*, Black. 1016; 2 S. & L. 303.

But as interest upon money secured upon a bond on mortgage becomes

due de die in diem, for the forbearance of the principal which the creditor can at any time recall, it will be apportionable, by common law, although it may expressly be made payable half-yearly. *Banner v. Lowe*, 13 Ves. 135; *Wilson v. Harman*, 2 Ves. 672; Amb. 279; *Sherrard v. Sherrard*, 3 Atk. 502; *Edwards v. Countess of Warwick*, 2 P. Wms. 176; 1 Bro. P. C. 207, Toml. Ed.

To prevent the injustice occasioned by this state of the common law as to rents, 11 Geo. 2, c. 19, s. 15, was passed, of which, after reciting as follows, "whereas when *any lessor or landlord having only an estate for life* in the lands, tenements or hereditaments demised happens to die before or on the day on which any rent is reserved or made payable, such rent or any part thereof is not by law recoverable by the executors or administrators of such lessor or landlord, nor is the person in reversion entitled thereto, any other than for the use and occupation of such lands, tenements or hereditaments, from the death of the tenant for life, of which advantage hath been often taken by the undertenants, who thereby avoid paying anything for the same," &c. &c., it is enacted, that "where *any tenant for life* shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments, *which determined on the death of such tenant for life*, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof, respectively."

Although the statute only enacts that the rent shall be apportionable on the death of a tenant for life, it has been held, that it extends to the case of a lease made by a *tenant in tail not binding upon the remainderman*, and that consequently the personal representatives of the tenant in tail could recover the rent due up to the time of his death. *Whitfield v. Pindar*, cited 2 Bro. C. C. 662; 8 Ves. 311. Whether the Judges in coming to such a decision did not assume a legislative power may be well doubted.

There is, however, another class of cases where money having been paid by the tenant to the remainderman for a whole half-year's rent, or part thereof, being on account of an interval during the life of a tenant in tail, who had made a lease not binding on the remainderman, where it has been decided that the representatives of the tenant in tail were entitled to an apportionment, not so much as coming within the words of the act, but upon the principle that a person who, being under no obligation, makes from conscientious motives a payment to another, such payment must be taken to be for the use of the person under whom the enjoyment of the lease was had. See *Paget v. Gee*, Amb. 198, 807, Blunt's Ed.; *Vernon v. Vernon*, 2 Bro. C. C. 659; *Hawkins v. Kelly*, 8 Ves. 311; *Aynsley v. Wordsworth*, 2 V. & B. 331; *Oldham v. Hubbard*, 2 Y. & C. C. C. 209.

Where the tenancy was created by a prior owner, although it determined by the death of a tenant for life, there was no apportionment. Thus where A. being tenant in fee died in January, 1833, during the currency of several Lady-day and May-day tenancies from year to year, without having given notices to quit in due time, and devised to B. for life, who died in August, 1833, after the expiration of those years of the tenancies, which were current at the death of the testator, and within the first half-year of the fresh tenancies, it was held by the Court of Exchequer, that the administrator of B., the devisee for life, could not recover that portion of the rent which became due between January, 1833, and August, 1833, under 11 Geo. 2, c. 19, s. 15, for both the tenancies running during that time were created not by her but by the tenant in fee, and did not therefore determine with her life. *Botheroyd v. Wooley*, 5 Tyrw. 522.

Where a tenant for life with power of leasing granted leases, some in writing, and some by parol not in conformity with the power, it was held, that as the interest of the lessee determined with the life of the lessor the rent was apportionable (*Ex parte Smyth*, 1 Swanst. 337; *Clarkson v. Scarborough*, 1 Swanst. 354; *Symons v. Symons*, 6 Madd. 207); as it was also on the death of a tenant for a term of years determinable on lives. *Paget v. Gee*, Amb. 810. It was however doubtful whether a tenant *pur autre vie* or his executors were within the statute. *Wykham v. Wykham*, 3 Taunt. 331.

In this state of the law 4 & 5 Will. 4, c. 22, was passed, which after reciting the 15th section of 11 Geo. 2, c. 19, and that doubts had been entertained whether the provisions of the said act applied to every case in which the interests of tenants determine on the death of the person by whom such interests had been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case was within the mischief intended to have been remedied and prevented by the said act, and it was therefore desirable that such doubts should be removed by a declaratory law, and after reciting that by law rents, annuities and other payments due at fixed or stated periods were not apportionable (unless express provision be made for the purpose), from which it often happened that persons (and their representatives) whose income was wholly or principally derived from these sources were deprived of means to satisfy just demands, and other evils arose from such rents, annuities and other payments not being apportionable, it was therefore enacted, that rents reserved and made payable on any demise or lease of lands, tenements or hereditaments, which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or

her executors or administrators (as the case may be) be considered as within the provisions of the said recited act (sect. 1).

That from and after the passing of this act all rent service reserved on any lease by a tenant in fee, or for any life interest, or by any lease granted under any power, (*and which leases shall have been granted after the passing of this act,*) and all rentcharge and other rents, annuities, pensions, dividends, moduses, compositions and all other payments of every description in the united kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under *any instrument* that shall be executed *after the passing of this act*, or (being a will or testamentary instrument) that shall come into operation *after the passing of this act*, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively, (as the case may be,) including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, *but the entire rents* of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity (sect. 2).

The provision herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable on policies of assurance of any description (sect. 3).

The object of this act, it will be observed, is twofold; *first*, to extend the remedies of 11 Geo. 2, c. 19, to the representatives of lessors not strictly

tenants for life, and to lessors whose interests determined by the death of the cestui que vies. *Secondly*, to apportion "rents, annuities and other payments not apportionable, unless express provision be made for the purpose." Hayes's Introd. 291. The act, it will be observed, extends to Scotland. *Fordyce v. Bridges*, 1 H. L. Cas. 1.

The "instrument" referred to in the statute, is not the instrument creating the periodical payments, but that creating a life interest therein. See *Knight v. Boughton*, 12 Beav. 312, in which case a testator having granted leases of his property before the statute came into operation, afterwards by his will, dated in 1836 (subsequent to the statute coming into force), gave his real estates to trustees in trust, after keeping up his mansion, and making certain other payments, to pay five-eighths of the net rents to his widow for life. The widow died in 1847, in the interval between two rent days. It was held by Lord Langdale, M. R., that the representatives of the widow were entitled to have the rents apportioned.

Upon the same principle, where a life interest in realty was created before the passing of the statute in 1787, and the proceeds arising from a sale thereof was, in 1821, invested in consols, it was held by Lord Langdale, M. R., that upon the death of the tenant for life, on the 9th December, 1841, her executors were not entitled to an apportionment of the dividends under 4 & 5 Will. 4, c. 22. *Michell v. Michell*, 4 Beav. 549.

Where leases were granted *after* the 4 & 5 Will. 4, c. 22, came into operation, under a power contained in a settlement, made *before* the passing of that act, it was held, that the rents were apportionable. *Lock v. De Burgh*, 4 De G. & Sm. 470.

The statute 4 & 5 Will. 4, c. 22, for the apportionment of rents and other periodical payments, applies only to cases in which the interest of the person interested in such rents and payments *is terminated by his death, or by the death of another person*; but does not apply between the real and personal representatives of a person, whose interest is not terminated at his death; there is no apportionment, therefore, where a person dies seised in fee, as his heir at law will take the whole of the rent. *Browne v. Amyot*, 3 Hare, 173; see also *Beer v. Beer*, 12 C. B. Rep. 60.

The Apportionment Act, 4 & 5 Will. 4, c. 22, does not apply to rents payable by tenants from year to year, which have not been reserved by an instrument in writing. *In re Markby*, 4 My. & Cr. 484.

The case, however, of *Kevill v. Davies*, 15 Sim. 466, at first sight seems to be at variance with the last decision. There A. on his father's death became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death, a suit was instituted on behalf of A. and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a portion of the estates. A. died under twenty-one and without issue. At his death, the estates were held, as they had ever been since his father's death, *by yearly tenants under parol demises*.

It was held by Sir L. Shadwell, V. C., that A.'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death.

It seems that the statute does not apply, and that consequently there will be no apportionment when a landlord determines the relation of landlord and tenant by his own act as by a re-entry (*Oldersham v. Holt*, 12 Ad. & Ell. 590); but semble, that it does, to a composition for tithes. *Oldham v. Hubbard*, 2 Y. & C. C. C. 209.

It must be remembered that now, by 14 & 15 Vict. c. 25, s. 1, it is enacted, "that, where the lease or tenancy of any farm or lands, held by a tenant at rack rent, shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate, and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done, if he had been living, or had continued the landlord or lessor. A fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor, to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions, to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year: Provided always, that no notice to quit shall be necessary, or required by or from either party to determine any such holding and occupation as aforesaid."

Although we have seen that at common law, as a general rule, rent was never apportioned in respect of time, it may in many cases be apportioned upon the division of the land out of which the rent issues.

Thus if a person who has a *rent service* purchase part of the land from which it issues, the rent will be extinguished *only* as to the part purchased, and the amount which will in future have to be paid will be apportioned according to the value of the land (Litt. sect. 222).

So, likewise, if a lessee for life or years surrender part of the land to the lessor (Co. Litt. 148 a), or the lessor enter upon part of the land for a forfeiture in part (Ib.), the rent will be apportioned.

So, likewise, if the lessor grant or devise part of the reversion, the rent which is incident to the reversion will be apportioned. Ib.; *Collins v. Harding*, 13 Co. 57 a; *Stevenson v. Lambard*, 2 East, 575.

Concerning the apportionment of rents, these distinctions are laid down by Lord Coke between a *grant* and a *reservation* of a rent. That, if a man

be seised of one acre of land in fee simple, and of another in tail, and by deed *grant* a rent out of both in fee, in tail, for life or for years, upon his death, the entailed land will be discharged, but the land in fee simple will remain charged with the *whole* rent; "for against his own grant he shall not take advantage of the weakness of his own estate in part. But if he make a gift in tail, a lease for life or for years, of both acres, *reserving* a rent, and upon his death the issue in tail avoid the gift or lease, the rent will be apportioned; for seeing the rent is reserved out of and for the whole land, it is but reasonable, when part is evicted by an elder title, that the donee or lessee should not be rateably with the whole rent, but that it should be apportioned rateably according to the value of the land." Co. Litt. 148 b.

If the grantee of a *rentcharge* releases part of his rent to the tenant of the land (Co. Litt. 147 b), or to a stranger, and the tenant (previous to 4 & 5 Anne, c. 16) attorned (Co. Litt. 148 a), the rent would be apportioned, and since the last-mentioned statute attornment is unnecessary. If, however, the owner of the rentcharge purchase only *part* of the land from which the rentcharge issues, it will, as we shall hereafter show more fully, be entirely extinguished.

So a rentcharge may be apportioned by act of law, as when part of it is extended upon a scire facias (*Wotton v. Shirt*, Cro. Eliz. 742; Gilb. Rents, 165), or a moiety upon an elegit (*Campbell's Case*, 1 Roll. Abr. 237, "Apportionment," 4), or if part of the lands subject to the rentcharge descend to the grantee. Litt. sect. 224; Gilb. Rents, 156.

Where a lessee is evicted from *part* of the demised premises, by a title paramount to that of his landlord, there will be an apportionment of the rent. 1 Roll. Abr. 235, "Apportionment" (B); *Stevenson v. Lambard*, 2 East, 575. If, however, he be evicted from part of the premises by his landlord, a suspension of the whole rent during the continuance of the eviction will take place. *Morrison v. Chadwick*, 7 C. B. 283; *Newton v. Allin*, 1 Q. B. 519.

Where part only of land comprised in leases for *terms* of years is taken for public purposes under the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the rent will be apportioned. Sect. 119. So where property included in a lease or underlease is required for the purposes of the Church Building Acts. See 17 & 18 Vict. c. 32.

V. Remedies for enforcing the Payment of Rent.

The lessor may bring an action to recover the rent in arrear. Formerly it was a matter of some importance to determine what was the nature of the action, whether it should be an action of debt on simple contract, *assumpsit* for the use and occupation of the premises, or covenant. This, however, has become immaterial since the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which renders it unnecessary to mention in the writ by which an action for rent is commenced what is the form of action.

The lessor may also take advantage of a condition of re-entry, or for making void the lease, on nonpayment of the rent. But now this remedy

at law (4 Geo. 2, c. 28, s. 2), as well as in equity (2 L. C. Eq 788), is a mere security for the rent.

As to the remedy of the landlord, when a tenant in arrear deserts the premises without leaving sufficient goods for a distress, see 11 Geo. 2, c. 19, s. 16.

The most summary and efficient remedy of a landlord to obtain payment of his rent is that of *distress*, the origin of which has been before mentioned. As a general rule, a landlord may distrain all the personal chattels found on the demised premises. Gilb. Distress, 33.

There are, however, certain chattels which have the privilege of not being liable to be taken by distress. In the first instance, a fixture annexed to the freehold, which might, it seems, be removed as against the landlord, or taken under an execution by fieri facias (*Poole's Case*, 1 Salk. 368, cannot be taken by distress, unless it can be removed without injury to itself or the freehold, and the annexation has taken place merely for temporary purposes, and for the more complete enjoyment and use of the fixture as a chattel. See Co. Litt. 47 b; *Niblet v. Smith*, 4 T. R. 504; *Gorton v. Falkner*, 4 T. R. 567; *Duck v. Braddyl*, M'Cle. 217; *Trappes v. Harter*, 2 Cr. & M. 177; *Darby v. Harris*, 1 Q. B. 895; *Hellawell v. Eastwood*, 6 Exch. 295; *Lane v. Dixon*, 3 C. B. 776. The principle upon which the cases turn is, that as a distress merely provides a pledge for payment of the rent, nothing ought to be so taken, unless it can be returned in the same condition as it was found (*Termes de la Ley*, "Distress," 269; Co. Litt. 47 a); and if fixtures be improperly taken by distress, the tenant can bring trover for them as goods and chattels. *Dalton v. Whitem*, 3 Q. B. 961; *Roffey v. Henderson*, 17 Q. B. 574.

Upon this principle, sheaves or shocks of corn could not at common law be taken in distress for rent (Co. Litt. 47 a); but now, by 2 Will. & Mary, c. 5, sheaves or cocks of corn, or corn loose or in the straw, or hay in any hovel, stack or rick, or otherwise on the land, may be distrained for rent on demise, lease or contract.

At common law growing corn could not be distrained, because it adheres to the freehold. 1 Roll. Abr. 666, H, pl. 4. But now by 11 Geo. 2, c. 19, lessors or landlords can distrain all sorts of corn, grass, or other product growing on the estate demised, and cut and gather them when ripe (s. 8). This statute is not applicable to young trees growing in a nursery ground, the word "product" being confined to things of the same nature, as corn and grass (*Clark v. Gasharth*, 8 Taunt. 431). Nor can a grantee of an annuity with a power of distress distrain growing crops under it, inasmuch as that privilege is only conferred upon lessors and landlords. *Miller v. Green*, 8 Bing. 92.

Chattels also are privileged from distress which have been intrusted to a person to bestow labour upon them in the course of his trade or occupation. Thus if a horse be sent to a smith's shop to be shod, materials to a weaver's shop to be made into cloth, cloth to a tailor's to be made into a garment, sacks of corn or meal to a miller to be ground (Co. Litt. 47 a), goods to an

auctioneer or commission agent to be sold (*Adams v. Grane*, 1 Cr. & M. 380; 3 Tyrw. 326; *Findon v. M'Laren*, 6 Q. B. 891; *Williams v. Holmes*, 8 Exch. 861; *Brown v. Arundell*, 10 C. B. 54), or a beast to a butcher to be slaughtered (*Brown v. Shevill*, 2 Ad. & Ell. 138), such chattels cannot be taken by a distress for the rent due from the persons to whose charge they were severally committed. See also *Gisbourn v. Hurst*, 1 Salk. 249; *Gilman v. Elton*, 3 Brod. & B. 75; *Thompson v. Mashiter*, 1 Bing. 283; *Mathias v. Mesnard*, 2 C. & P. 353; *Gibson v. Ireson*, 3 Q. B. 39.

The reason of this exemption is for the benefit of trade, which might be injured if persons were afraid to intrust their goods to poor tradesmen. Co. Litt. 47 a. The Courts, however, do not seem inclined to carry the exception to cases which do fall within the reason by which it was established. See *Muspratt v. Gregory*, 1 M. & W. 633; 3 M. & W. 677; *Joule v. Jackson*, 7 M. & W. 450; *Parsons v. Gingell*, 4 C. B. 545.

Upon the same principle, the property of persons at an inn is not liable to distress. *Crosier v. Tomkinson*, 2 I.d. Ken. 439; Bac. Abr. "Inns and Innkeepers" (B).

Things also which are in actual use, as a horse on which a person is riding, an axe with which a person is cutting wood, and the like, are privileged from distress for rent. Co. Litt. 47 a; and see *Simpson v. Hartopp*, Willes, 512; 1 Smith's L. C. 187, and note. The reason for this exemption is, that if persons were deprived of things which they are actually using, it would probably excite them to commit a breach of the peace, which it is good public policy to avoid.

Things in the custody of the law, as, for instance, if they have been distrained damage feasant (Co. Litt. 47 a), or taken in execution *Peacock v. Purvis*, 2 Brod. & B. 362), are not liable to distress. But goods in the custody of a messenger under a fiat in bankruptcy are not privileged (*Briggs v. Sowry*, 8 M. & W. 729); nor are growing crops seized and sold by the sheriff, and left on the premises, provided there is no other sufficient distress. 14 & 15 Vict. c. 25, s. 2.

It has been laid down by Lord Coke that a distress can only be had of a thing "whereof a valuable property is in somebody." And that "therefore dogs, bucks, does, conies, and the like, that are feræ naturæ, cannot be distrained." Co. Litt. 47 a. But dogs being now considered by the law as valuable, there seems to be no reason why they should not be taken by distress, (see *Wright v. Ramscott*, 1 Saund. 83; *Binstead v. Buck*, 2 W. Black. 1117,) since deer kept in a private inclosure can be distrained. *Davies v. Powell*, Willes, 48.

Some things are *conditionally* privileged from distress; that is to say, if there are other goods sufficient for the purpose to be found on the premises. Amongst these may be mentioned beasts belonging to the plough—*averia carucæ* (Co. Litt. 47 a), sheep (Ib. note 17), utensils or instruments of a man's trade or occupation, as the axe of a carpenter or the books of a scholar (Co. Litt. 47 a). See also *Fenton v. Logan*, 9 Bing.

676; *Gorton v. Falkner*, 4 T. R. 565. But the landlord is not obliged to distrain grass or growing corn before taking things conditionally privileged, as beasts of the plough. See *Piggott v. Birtles*, 1 M. & W. 451, where Parke, B., observes, "The landlord has a right to resort to the subjects of distress which are *immediately* available to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period. If there are other moveable chattels to the amount of the rent and expenses, besides *averia caruæ*, he would not be justifiable in taking the latter; but if there are not, he has a right to take and sell all or so many of the beasts of the plough as may be necessary, with the other moveable and saleable chattels, to satisfy the arrears and charges."

Except in the case of the Queen, who may distrain on all the lands in the occupation of a tenant, of whomsoever they may be held (Com. Dig. Distress (A), 3), a lessor, as a general rule, can only distrain goods on the demised premises (*Ib.* (B), 1; Co. Litt. 161 a; *Capel v. Buzzard*, 6 Bing. 150, and cattle and stock may be distrained upon any common appendant or appurtenant, or any ways belonging to all or any part of the premises demised or holden. (11 Geo. 2, c. 19, s. 8.)

And the Statute of Marlebridge, c. 15 (52 Hen. 3), which was in affirmance of the common law, enacted that with the exception of the king, no one should distrain "out of his fee, nor in the king's highway, nor in the common street." See 2 Inst. 131.

There are, however, exceptions to the rule. Thus, if the landlord came to distrain cattle which he sees then within his fee, and the tenant or some other person, to prevent the distress, drive them out of the fee, yet the landlord may freshly follow, and distrain them out of his fee, for, in the judgment of law, the distress is taken within his fee. Co. Litt. 161 a. But it seems that if the lord had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle, of themselves, after the view, go out of the fee, or if the tenant, after the view, remove them for any other cause than to prevent the distress, then the landlord cannot distrain out of his fee. *Ib.*

Where, however, the tenant fraudulently or clandestinely removes his goods in order to prevent their being distrained, the landlord may within *thirty days* follow and distrain them wherever they may be found, except in the hands of a purchaser for valuable consideration, without notice. 8 Anne, c. 14, s. 2; 11 Geo. 2, c. 19. It will be observed that the landlord may follow the goods, if the removal be fraudulent, although not clandestine (*Opperman v. Smith*, 4 D. & R. 33), and it is immaterial whether the person on whose premises the goods are found is privy to the fraud. *Williams v. Roberts*, 7 Exch. 618.

These statutes, however, do not enable the landlord to follow and distrain the goods of a third party, which have been removed from the demised premises. *Thornton v. Adams*, 5 M. & S. 38; *Postman v. Harrell*, 6 C. & P. 225.

A landlord can only make a distress in the daytime, that is to say,

between sunrise and sunset, the reason being that the tenant might be able to see the landlord or his bailiff coming, and avoid the distress by making a tender. (Co. Litt. 142; Gilb. on Distress, 50; *Aldenburgh v. Peaple*, 6 C. & P. 212.) Hence as the rent does not become due till the last minute of the day on which it is payable, the landlord cannot, in the absence of any contract or custom by which the rent is payable earlier (*Lee v. Smith*, 9 Exch. 662; *Buckley v. Taylor*, 2 T. R. 600), distrain before sunrise of the next day. Co. Litt. 47 b, note 6; *Duppa v. Mayo*, 1 Wms. Saund. 282.

At common law a landlord could not distrain for rent after the term was ended. The consequence was, that as a landlord could not distrain for rent the day it was due but the day after, when the term was ended, he could not, unless he by contract made the rent payable before the expiration of the term, have any remedy by distress for his last half-year's rent. Co. Litt. 47 b. The legislature, however, has interposed to prevent the inconveniences arising from such a state of the law, and by 8 Anne, c. 14, rent may be distrained for *after* determination of the lease in the same manner as before, if the distress is made within *six calendar months* afterwards, and during the continuance of the landlord's title and the *possession* of the tenant from whom the arrears are due. It has been held, that the landlord may distrain part of the demised premises, if the tenant is no longer in possession of the whole (*Nuttall v. Staunton*, 4 B. & C. 51), or upon the representatives of a tenant who had entered (*Braithwaite v. Cooksey*, 1 H. Black. 465). And where there is a custom of the country for the tenant to leave his away-going crop in the barns for a certain period after the termination of the tenancy, the landlord may distrain, though six months have elapsed since that time. (*Bearan v. Delahay*, 1 H. Black. 5; *Griffiths v. Puleston*, 13 Mees. & W. 358.) But where the tenant has himself left after the expiration of the term, leaving some cattle on the premises and a new tenant has entered, the landlord cannot put in a distress, as there is no *continuance* of the tenant in possession within the meaning of the act. (*Taylorson v. Peters*, 7 Ad. & Ell. 110.) Nor is the statute applicable where the tenancy is determined by the wrongful disclaimer of the tenant. *Doe d. David v. Williams*, 7 C. & P. 322.

Where proceedings are taken upon an avowry at common law for rent in arrear and not under the statute, it must be alleged that at the time when the distress was made it was during the continuance of the landlord's title or interest. *Williams v. Stiven*, 9 Q. B. 14.

The distress may be made either by the landlord himself personally, or by his agent or bailiff acting under a warrant of distress, which must be signed by the landlord, but does not require a stamp, and if there are several landlords, as in the case of joint tenants, the signature of one of them will be sufficient should the others not dissent, *Robinson v. Hofman*, 4 Bing. 562; and although the bailiff distrain for rent due to himself, he may justify as bailiff of the person who gave him authority to distrain.

Trent v. Hunt, 9 Exch. 14. A ratification by the landlord of a distress made by a person acting as his bailiff will be sufficient. Bro. Abr. "Traverse per sans ceo," pl. 3.

A person is not obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can show that he had a legal justification for what he did it is sufficient. Thus a man may distrain for rent and avow for heriot service. *Fitzherb. Avowry*, 232; 3 Co. 26; 7 T. R. 657; *Lucas v. Nockells*, 10 Bing. 172.

As the tenant may prevent the distress by tendering a sufficient sum to his landlord, so he may do so in the case of his bailiff. And the landlord, when he gives a warrant to his bailiff to distrain, is at law considered by implication to authorize him to receive the rent, if a tender thereof be made by the tenant. *Hatch v. Hale*, 15 Q. B. 10.

With the exceptions hereinafter mentioned, the outer door of a house (*Browning v. Dann*, Bull. N. P. 81), or of a stable (*Brown v. Glenn*, 16 Q. B. 254) must not be broken open for the purpose of making a distress, otherwise an action of trespass will lie against the person making the distress. But the outer door may be opened in the usual mode, as by turning a key, lifting a latch or drawing back the bolt (*Ryan v. Shilcock*, 7 Exch. 72), and when once the outer door is properly opened, the person making the distress will be justified in breaking open any inner doors. See *Browning v. Dunn*, Bull. N. P. 81.

In *Gould v. Bradstock*, 4 Taunt. 562, it was held by the Court of Common Pleas, that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent. "The defendant," said Mansfield, C. J. "removes the floor of his room, which floor was his; it is said, that it served as a ceiling to the tenant below, but that at most could only make him tenant in common; and one tenant in common although he probably might have some remedy or other for being disturbed in the use of his ceiling, cannot bring trespass against his companion. After the defendant has moved the boards, he can get into the house, and that without a trespass; and when he can get into the house without trespass, he may lawfully distrain."

Having obtained an entrance on the premises, a seizure must be made of the goods to be taken in distress, to effect which slight acts will be held sufficient; and although they are allowed to be taken away for a temporary purpose, upon their return it will not be considered that the distress was abandoned. *Swann v. Earl of Falmouth*, 8 B. & C. 456; *Hutchins v. Scott*, 2 Mees. & W. 809; *Wood v. Nunn*, 5 Bing. 10; *Kirby v. Harding*, 6 Exch. 234; *Hartley v. Moxham*, 3 Q. B. 701.

The next thing to be done is to take an inventory of the things seized, and to leave it with notice, in writing (*Wilson v. Nightingale*, 8 Q. B. 1034), of the distress at the chief mansion-house, or other most notorious

place on the premises, charged with the rent distrained for (2 W. & M. sess. 1, c. 5, s. 2). The want of notice does not render the distress invalid (*Trent v. Hunt*, 9 Exch. 14), and an inaccuracy in stating the amount for which a distress has been made, as, for instance, where the landlord has distrained for a larger amount than was due, will not be actionable. See *Tancred v. Leyland*, 16 Q. B., 669; *Stevenson v. Newnham*, 13 C. B. 285, overruling *Taylor v. Henniker*, 12 Ad. & Ell. 488.

And under the 7th section of 11 Geo. 2, c. 19, the landlord or his agent, where goods have been fraudulently or clandestinely conveyed away and detained in any place, upon obtaining the aid of a constable or peace officer (*Rich v. Wooley*, 7 Bing. 651; *Cartwright v. Smith*, 1 M. & Rob. 284), if the place be a dwelling-house, having previously made an oath before a magistrate of reasonable grounds for suspecting that the goods are there, but without any previous request to open them (*Williams v. Roberts*, 7 Exch. 618), may break open the doors and take the goods in distress. See also *Welch v. Myers*, 4 Camp. 368; *Parry v. Duncan*, 7 Bing. 243; *Thornton v. Adams*, 5 Mau. & Sel. 38.

The landlord having now seized and got the goods into his possession, we will next consider what he can do with them in order to make them available for the payment of his rent. At common law a landlord who had taken goods in distress, only held them as a pledge until the rent was paid. In the meantime it was his duty to keep them safely. Thus it is laid down by Lord Coke, that where a person distrains any thing that hath life, such as cattle, he must impound them in a lawful pound within three miles in the same county, and that is either *overt or open*, in a pinfold made for such purposes, or in his own close, or in that of another by his consent, Co. Litt. 47 b; and see 1 & 2 P. & M. c. 12. And it is called open, because the owner may give his cattle meat and drink without trespass to any other, and then the cattle must be sustained at the peril of the owner (Co. Litt. 47 b; Bac. Abr. "Distress" (D)); but now the person who impounds animals must supply them with sufficient food and nourishment, and he has power to recover not exceeding double the value thereof, 5 & 6 Will. 4, c. 59, s. 6; see *Mason v. Newland*, 9 C. & P. 575; and *Layton v. Hurry*, 8 Q. B. 811. If, however, the cattle were impounded in a pound, *covert or close*, as in some part of the house of the person who took them, then he was bound to sustain them with food and drink at his own peril without having any satisfaction therefor. Co. Litt. 47 b.

Where the distress consists of such things as household utensils, which are liable to take harm by wet or weather, or be stolen if exposed, he must impound them in a house or other pound covert, within three miles within the same county, for if he impound them in pound overt, he will be answerable for them. Co. Litt. 47 b.

It has, however, been enacted, by 11 Geo. 2, c. 19, s. 10, "that in cases of distress for rent, the person distraining may impound, or otherwise secure the distress, on such part of the premises as shall be most convenient."

Where growing crops are distrained; they must be impounded, after having been harvested by being laid up in barns, or other proper places on the premises, or if there be none on the premises, then in any other barn or proper place as near as may be to the premises. 11 Geo. 2, c. 19, s. 8.

Assuming that the goods are properly impounded by the landlord, although, as we have seen at common law, they would be merely a pledge to be detained until the rent was paid, the legislature has given additional power to the landlord to enable him to sell them, and thence obtain satisfaction. The statute 2 Will. & Mary, sess. 1, c. 5, s. 2, by which this power was conferred on the landlord, enacts, "that where any goods or chattels shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not within *five days* next after such distress taken, and *notice* thereof (with the cause of such taking) left at the chief mansion-house, or other most notorious place on the premises charged with the rent distrained for, replevy the same, with sufficient security to be given to the sheriff according to law, that then in such case, after such distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff or under-sheriff of the county, or with the constable of the hundred, parish or place where such distress shall be taken (who are hereby required to be aiding and assisting therein), cause the goods and chattels so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff or constable are hereby empowered to swear) to appraise the same truly, according to the best of their understandings, and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the overplus (if any) in the hands of the said sheriff, under-sheriff or constable, for the owner's use."

Goods, also, which having been fraudulently or clandestinely removed, and taken in distress out of the premises, can be sold. 11 Geo. 2, c. 19, s. 8.

With regard to appraisement; it seems that notwithstanding 57 Geo. 3, c. 93, two sworn appraisers are requisite, unless the distress be under 20l., see *Fletcher v. Saunders*, 1 M. & Rob. 375; *Bishop v. Bryant*, 6 C. & P. 484; *Allen v. Flicker*, 10 Ad. & Ell. 640; as to the swearing, see *Avenell v. Croker*, Moo. & Malk. 172; *Kenney v. May*, 1 M. & Rob. 56. It is not necessary to have professional appraisers, provided they be fit persons (*Roden v. Eyton*, 6 C. B. 427); but a person making the distress cannot appraise it. *Westwood v. Cowne*, 1 Stark. 172; *Lygon v. Weldon*, 2 Bing. 336.

The five days mentioned in the act must be calculated *exclusively* of the day of taking the distress, and *inclusively* of the day of sale. See *Robinson v. Waddington*, 13 Q. B. 753, overruling *Wallace v. King*, 1 H. Black. 13.

VI. Remedies against wrongful Proceedings to obtain Payment of Rents.

According to the common law, although a landlord had in any particular case a right to distrain, yet if he abused his authority to distrain, he became a trespasser ab initio. *Six Carpenters' Case*, 8 Co. 146; 2 Smith's L. C. 65.

But by statute 11 Geo. 2, c. 19, if rent were justly due, any irregularity in the distress will not make the landlord a trespasser ab initio, though the tenant may recover satisfaction in an action, sect. 19; unless the landlord make tender of amends before the action brought, sect. 20.

Where a mere stranger distrains, the tenant may either have brought an action of trespass or trover, by which he might have obtained damages for the seizure of his goods; and now, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), courts of common law have power to compel the specific delivery up of chattels. He may also proceed by the action of replevin.

The tenant has the same remedies against his landlord in case of an improper distress. If no rent was due at the time of the distress, the landlord is liable in an action on the case to pay double the value of the goods distrained. 2 Will. & Mary, sess. 1, c. 5, s. 5; *Masters v. Farris*, 1 C. B. 715.

The action of replevin is the one usually adopted by the tenant, inasmuch as he can thereby recover the goods at once until the question is decided whether the landlord has the right to distrain or not. This action formerly commenced by plaint in the Sheriff's Court, under the Statute of Marlebridge (52 Hen. 3, c. 21); and, upon the defendant's avowry of his right to seize the goods, the sheriff, while the title was in dispute, replevied, that is to say, restored the goods to the tenant upon his giving as security (Stat. Westminster 2; 13 Edw. 1, c. 2) his own bond with two responsible sureties in double the value of the goods distrained, to prosecute the suit with effect and without delay (11 Geo. 2, c. 19, s. 23), and unless the sureties are apparently responsible (*Hindle v. Blades*, 5 Taunt. 225), the sheriff will be liable for a due want of discretion, if they are insufficient, *Jeffery v. Bastard*, 4 Ad. & Ell. 823; *Plumer v. Brisco*, 11 Q. B. 46. Proceedings, however, in replevin, are now commenced in the County Courts (9 & 10 Vict. c. 95, ss. 119, 121), removable by certiorari into the Superior Courts, where the title is in question, or the rent or damage in respect of which the distress is taken exceeds 20*l.* (Ib. s. 121); and see *Mungean v. Wheatley*, 6 Exch. 88; and *Stansfeld v. Hellawell*, 7 Exch. 373. The sheriff still takes the bond (*Edmonds v. Challis*, 7 C. B. 413), although it seems it will not be void though taken by the judge. *Stansfeld v. Hellawell*, 7 Exch. 373.

If the tenant be successful in the action of replevin he recovers damages, if the landlord be so he recovers the arrears and costs. 17 Car. 2, c. 7.

As to the action of replevin, see Bac. Abr. "Replevin and Avowry;"

Selwyn's N. P. Replevin; notes to *Mounson v. Redshaw*, 1 Wms. Saund. 193.

VII. *The Extinguishment and Suspension of Rents.*

A rent may be extinguished in various ways, either by the express or implied contract of the parties or by the operation of law.

The tenancy may be dissolved by mutual consent, as for instance by a surrender of the lease, in which case the rent would be extinguished from the time fixed upon by the contract. So, if the owner of a rentcharge released the *whole* of the land from such rentcharge, it is obvious that the rent will be extinguished.

Where there is unity of ownership of the rent and the land out of which it issues, the rent will be extinguished. See Bro. Abr. tit. "Extinguishment and Suspension," pl. 18, 28. Thus an absolute purchase of the tenancy by the lord will be an extinguishment of the rent (Gilbert on Rents, 149); but if the purchase was upon condition, or was only of a particular estate of shorter duration than that which the landlord had in the rent-service, in these cases, though there be an union of the tenancy and the rent in the same hand, yet, because that union is but temporary, the rent will not be extinguished but only suspended. Ib. 150; and see *Dixon v. Harrison*, Vaugh. 39; *Hodgkins v. Thornborough*, Pollexf. 142.

It might be naturally supposed, that whenever a person entitled to a rent purchased only *part* of the land from which it issued, that, in the case of every kind of rent, an apportionment would take place. This, however, is not so, inasmuch as there is a most important difference between the effect of the purchase of *part* of the land, in the case of a *rent-service* and *rent-charge*.

Thus, if a person has a *rentcharge* to him and his heirs, issuing out of certain land, and he purchase *part* of the land in fee, the rentcharge will be extinguished (Litt. s. 222). A reason by no means satisfactory is given for this by Lord Coke; "the rent," he observes, "is entire, and against common right, and issuing out of every part of the land, and therefore by purchase of part, it is extinct in the whole, and cannot be apportioned" (Co. Litt. 147 b).

A *rent-service*, however, under similar circumstances would only be extinguished, as to the parcel of the land purchased, and there would be an apportionment of the rent, according to the value of the land (Gilbert on Rents, 151); except where the rent-service was not susceptible of apportionment, as if it were to render yearly to the lord at a particular time a horse or the like (Litt. s. 222). Where, however, the entire service is for the benefit of the public, as, for instance, to repair a bridge or way, or to keep a beacon, or if it be for the advancement of justice, or a work of piety, the tenant will still be chargeable with the whole services. Co. Litt. 149 a.

Where a *part* of the land out of which a rentcharge issues is devised to the grantee, the rentcharge will be extinguished, although the devise be made over and above the rentcharge; *Dennett v. Pass*, 1 Bing. N. C. 388.

Where part of the hereditaments charged with the rentcharge descends upon the grantee, because it comes to him not by his own act, but by operation of law, an apportionment of the rent will take place. Litt. s. 224.

Where a person has a *rentcharge* out of land, and releases part of such land from the rent, the whole rent will be extinguished, because it issues out of the whole of the land; but he may release part of the rentcharge, without extinguishing the whole, because it is said, "the grantee deals only with that which is his own, namely, the rent and not the land." Vin. Abr. "Rent," 504; 3 Cruise, Dig. 301; Co. Litt. 148.

It has been observed, that "the doctrine as to the extinguishment of a rentcharge causes great difficulty where one has a rentcharge, and it is wished to discharge part of the land from the payment; in order to enable a sale or mortgage of such parts, one practised mode of preserving the rentcharge in other parts is, agreeing that the rentcharge shall not be prejudiced in such other parts, but shall be wholly payable thereout. But this seems to be rather a new grant of the rentcharge, by implication, than a preservation of the old rentcharge. Another mode sometimes adopted is, having a covenant from the owner of the rentcharge, not to claim the rentcharge out of the land intended to be exonerated. But, even this mode is not quite free from exception; for according to some books it seems, that such a covenant amounts to a release." Co. Litt. 147 b, n.; see *Butler v. Monnings*, Noy, 5; *Deux v. Jefferyes*, Cro. Eliz. 352; Shep. Touch. by Prest. 345; *Walmesley v. Cooper*, 11 Ad. & Ell. 216.

The interference of the legislature is much needed to put an end to such a state of the law, founded upon artificial reasoning, and attended with inconvenient results.

As the landlord in the absence of any express contract, is bound to maintain the tenant in the enjoyment of land demised, as against all persons claiming under him, or paramount to him, it follows that if the tenant be evicted from the premises by the landlord, or any person claiming *under* him, or if they be recovered by any person claiming *paramount* to him, the tenant will be discharged from payment of the rent from the time of such eviction or recovery, but not of that previously due. 2 Roll. Abr. 429; Co. Litt. 201 b, 148 b; Gilb. on Rents, 146; *Boodle v. Cambell*, 7 Mann. & Gr. 386; *Selby v. Browne*, 7 Q. B. 620.

A mere trespass, however, by the landlord, 1 Wms. Saund. 205, n. (2), or eviction by a stranger, will be no answer to a demand of rent by the landlord. See *Paradine v. Jane*, Alleyne, 26; where the tenant pleaded that he had been evicted by Prince Rupert, who had invaded the realm with a hostile army, entered upon the defendant's possession and expelled him, so that he could not take the profits; it was however held, that the plea was insufficient.

An eviction by the landlord from a *part* of the premises creates a suspension of the entire rent during the continuance of the eviction, until the

tenant re-enters and resumes possession. (1 Wms. Saund. 204, and authorities there cited.) The tenancy, however, will not be thereby put an end to, nor will the tenant be discharged from the performance of his covenants, other than the covenant for payment of rent. *Morrison v. Chadwick*, 7 C. B. 266, 283. See also *Newton v. Allin*, 1 Q. B. 518.

If a person recover *part* of the premises by a title paramount to that of the landlord, the rent will be apportioned. 1 Roll. Abr. "Apportionment," B; *Stevenson v. Lambard*, 2 East, 575.

Where, however, a lessee has never been able to obtain possession of *part* of the demised premises, in consequence of a paramount title in another person, the demise will be void, and the landlord will not be able to distrain for any part of the rent. Thus, in *Neale v. Mackenzie*, 1 Mees. & W. 747; S. C. 2 Cr. M. & R. 84, a lessee of one hundred acres of land accepted the lease and entered upon the land. Upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half a year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates and averments in the pleadings that the prior lease was for a term extending beyond the duration of the latter lease. It was held on error in the Exchequer of Pleas, reversing the judgment of the Court of Exchequer, that the latter demise was *wholly void* as to the eight acres, and that the rent was not apportionable, and the lessor was not entitled to distrain for the *whole* or *any part* of the rent. See also *Doe d. Griffiths v. Lloyd*, 3 Esp. 78.

It may be here mentioned that a landlord may by express contract either extend (*Nash v. Palmer*, 5 Mau. & Sel. 374; *Fowle v. Welsh*, 1 B. & C. 29; *Lewis v. Smith*, 9 C. B. 610) or limit (*Merritt v. Frame*, 4 Taunt. 329; *Stanley v. Hayes*, 3 Q. B. 105) his liability to protect his tenant against evictions.

Although the buildings upon the premises may have been burnt down, and they may have been thereby rendered useless to the tenant, he will nevertheless be compelled to pay the rent. *Pindar v. Ainsley*, cited 1 T. R. 312; *Baker v. Holtpzaffell*, 4 Taunt. 45; *Leeds v. Cheetham*, 1 Sim. 146; *Izon v. Gorton*, 5 Bing. N. C. 501; *Surplice v. Farnsworth*, 7 Mann. & Gr. 576; *Packer v. Gibbins*, 1 Q. B. 421.

It has been before stated that *rent-service* is incident to the reversion; where, therefore, the reversion was destroyed, as by merger in an ulterior remainder or reversion, the rent was extinguished. Thus where a person made a lease for 100 years, and the lessee made an underlease for twenty years, rendering rent with a clause of re-entry, and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term, it was held that the grantee should not have either the rent or the power of re-entry, for the reversion of the term to which they were incident was extinguished in the reversion in fee. And though this case was only

determined at the assizes, yet it was afterwards recognized in the Court. *Threr v. Barton*, Moor, 94; and see *Webb v. Russell*, 3 T. R. 393, 403. The same result followed where lessees of renewable leaseholds surrendered their leases for the purpose of obtaining renewals, and to prevent it they were obliged, on renewals, to obtain surrenders from their underlessees. This, however, was rendered unnecessary by 4 Geo. 2, c. 29, s. 6; and 8 & 9 Vict. c. 106, s. 9, enacts, "that when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the 1st October, 1845, be surrendered or merge; the estate which shall for the time being confer as against the tenant under the same lease, the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease."

Upon the death of a person entitled to the fee-simple of a rentcharge in-testate and without heirs it will not escheat but sink into the land from which it issues. Bro. Abr. tit. "Extinguishment and Suspension," pl. 2.

Rent payable out of land is extinguished by its nonpayment for twenty years, and time runs from the last actual receipt. See 3 & 4 Will. 4, c. 27, s. 2; *Owen v. De Beauvoir*, 16 Mees. & W. 547; *De Beauvoir v. Owen*, 5 Exch. 166; *Lord Chichester v. Hall*, 17 L. T. 121, Q. B.

The limitation, however, prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rentcharge is barred by the above statute. *Manning v. Phelps*, 10 Exch. 59.

CHUDLEIGH'S CASE (a).

THE CASE BETWEEN DILLON & FREINE.

Hil. Term, 31 Eliz., Rot. 65, in the King's Bench.

[REPORTED 1 Co. 120 a.]

Sir R. C. conveyed his manor of H. to trustees and their heirs, to the use of himself and his heirs on the body of M., the wife of J. C., lawfully begotten; in default of such issue, to the use of him and his heirs on the body of E., the wife of R. B., lawfully begotten; and in default of such issue, to the use and performance of his last will, for ten years immediately after his death, and, after the term ended, to the use of the feoffees and their heirs during the life of C., his eldest son, remainder to the use of the sons of C. successively in tail, remainders over. C. not having issue, the feoffees enfeoffed him of the lands to the use of him and his heirs, having notice of the use; and afterwards C. had issue J., and by bargain and sale conveyed the manor to Sir J. C. in fee, but before the enrolment enfeoffed him in fee, with a general warranty. Sir J. C. enfeoffed P. C. in fee, who granted the locus in quo, being customary land, by copy, to the defendant, upon whom the son of C. entered:—Held, that the destruction of the contingent estate by feoffment, before the contingent remainder came in esse, destroyed the contingent remainder; for contingent remainders limited by way of use, as well as in conveyances at common law, must vest at or before the determination of the preceding estate. Also, 1st. A feoffment by tenant for life, or tenant in tail, to him in reversion after a mesne estate of inheritance, is in the one case a forfeiture, and in the other a discontinuance, divesting the mesne estate of inheritance; secus where it is made to the immediate remainderman or reversioner. 2nd. If a warranty descends upon

(a) *S. C.* 1 Poph. 70; 1 Anders. 309. See an abstract of a translation of Anderson's Report, Sugd. Gilb. Uses, Append. No. 4.

the heir, who, at the time of the fall of the warranty, is an infant, and his entry is lawful, it is not barred by the warranty, but he may afterwards enter and avoid the estate within a year or after his full age; secus if he has only a right of action. 3rd. Voluntary grants of copyhold by lords by defeasible title are not binding on the rightful owners; secus as to admittances. 4th. An estate to one and his heirs, during the life of another, is but an estate for life upon which a remainder may depend. 5th. A gift to a man and his heirs on the body of another man's wife is an estate tail.

Uses in esse are executed immediately by the statute.

Contingent uses are not executed till they come in esse, but a possibility of seisin or scintilla juris remains in the trustees to serve such uses when they arise, and if the possession is disturbed, they may re-enter to revest the uses, and this possibility of seisin may be released or destroyed, and the contingent uses will be thereby defeated.

WILLIAM (b) DILLON, Esq., brought an action of trespass against John Freine, in the King's Bench, for breaking his close called Sedon, in the parish of Tavistock, in the county of Devon: the defendant pleaded not guilty, and the jury found a special verdict to this effect; Sir Richard Chudleigh, Knight, was seised of the manor of Hescot, whereof the place where, &c., was parcel in his demesne as of fee, and had issue Christopher Chudleigh his eldest son, Thomas his second son, Oliver his third son, and Nicholas his fourth son.

Sir Richard Chudleigh, 26 Aprilis, annis 3 & 4 Phil. & Mar., by his deed indented quadripartite (whereof one part sealed with his seal was showed forth to the jurors in evidence) of the said manor did enfeof Sir John Sentleger, Knight, Sir Giles Strangeways, Knight, and divers others, to have and to hold to them and their heirs, to the use of the said Sir Richard and (c) his heirs on the body of Mary, then wife of Thomas Carew, lawfully begotten; and for default of such issue to the use of the said Sir Richard, and to his heirs on the body of Elizabeth, then wife of Richard Brampfield, lawfully begotten; and for default of such issue, to the use and performance of his will for ten years immediately after his death; and after the said term ended, to the use of the said feoffees and their heirs, during the life of the said Christopher

(b) See the references, *supra*.

(c) Poph. 76; Co. Litt. 20 b, 25 b, 184 a; Plow. 35 a; Bro. "Tail," 16; Bro. "Estate," 22; Bro. "Condition," 119; 10 Co.

50 b; 15 H. 7, 10 b; F. N. B. 205 h; Shep. Touch. 489; Com. Dig. "Estates," B, 5; 1 Co. 140 b, n.

Chudleigh the son, and after his death to the use of the first issue male of the body of the said Christopher lawfully to be begotten, and to the heirs of the body of such first issue male lawfully begotten; and for default of such issue, to the use of the second issue male of the body of the said Christopher his son, lawfully to be begotten, and to the heirs of the body of such second issue lawfully begotten; and so with like remainders unto the tenth issue male; and for default of heirs male of the body of the said Christopher the son, to the use of Thomas, son of the said Sir Richard, and to the heirs of his body lawfully begotten: and for default of such issue, to the use of the said Oliver, and to the heirs of his body lawfully begotten; and for default of such issue, to the use of the said Nicholas, and to the heirs of his body lawfully begotten; and for default of such issue, to the use of the right heirs of the said Sir Richard Chudleigh for ever.

And afterwards, that is to say, 17 Nov., 5 & 6 Phil. & Mar., the said Sir Richard Chudleigh died without issue of the body of the said Mary and Elizabeth, or either of them, and after his death, that is to say, 14 Aug., 1 Eliz., the said feoffees (the said Oliver Chudleigh then being alive) by their deed sealed with their seal, bearing date the same day and year, did enfeof the said Christopher Chudleigh in fee, to the use of him and his heirs, which feoffment was made without any consideration. And the said Christopher then had notice of the said uses in the said *quadrupartite* indenture specified and declared.

And afterwards, that is to say, 20 Sept., 3 Eliz., the said Christopher had issue, Strachley Chudleigh, his eldest son; and afterwards, that is to say, 3 Martii, 5 Eliz., the said Christopher had issue John Chudleigh, his second son; and afterwards, 1 Julii, 6 Eliz., by deed indented and enrolled the 4th day of October next ensuing, before the clerk of the peace and one justice of the peace within the said county, according to the stat. of 27 H. 8, did bargain and sell the said manor to Sir John Chichester, Knight, and his heirs, to the use of him and his heirs; but it was found, that between the date of the said indenture, and before the enrolment, that is to say, 6 Julii, anno sexto supradicto, the said Christopher, by his deed, sealed with his seal, bearing date the same day and year, of the said manor, did enfeof the said Sir John Chichester and his heirs, to the use of him and his heirs, with a (d) general warranty against all persons; and afterwards the said Strachley, anno 12 Eliz., died without issue; and the jury further

found, that Sir John Chichester, 6 Sept., 7 Eliz., of the said manor did enfeof Philip Chichester in fee; and that the said Philip, at the court of the said manor, held 8 October, in the fifteenth year of the said queen, did grant the place where, &c., being customary land, by copy to the said John Freine for his life, according to the custom of the manor, by force whereof he entered, upon whom the said J. Chudleigh, 11 Martii, 28 Eliz., did enter into the said manor, and the same day and year did thereof enfeof the said William Dillon, now plaintiff in fee, who entered in the place where, &c., upon the possession of the defendant, upon whom he re-entered; and whether upon the whole matter the said John Freine be guilty or not, the jurors pray the discretion of the justices, &c.

And this case as to the principal point was such:

Sir Richard Chudleigh having issue Christopher, Thomas, Oliver and Nicholas, after the stat. of (e) 27 H. 8, did enfeof divers of the manor of Hescot in fee to the use of his feoffees and their heirs, for the (f) life of Christopher his eldest son, and after to the use of the tenth son; and after to the use of Thomas his second son, in tail; and after to the use of Oliver his third son, in tail; and after to the use of Nicholas his fourth son, in tail; and after to the use of the right heirs of Sir Richard: Sir Richard died, and before any issue born of the body of Christopher the eldest son, the feoffees enfeofed Christopher, having notice of the former uses, and afterwards Christopher had issue Strachley and John.

If the use, which was before in contingency, shall vest in the said sons of Christopher, and shall be executed by the stat. of 27 H. 8, was the question, and great doubt of the case; and the question in this case is no other, but whether these contingent uses, before their

(e) 27 H. 8, cap. 10; Co. Litt. 36 b, 187 b; 1 And. 29, 37, 42, 47 b, 52, 54 b, 68 b, 75, 78 b, 115 b; Hob. 338; 1 Leon. 14, 259; 2 Leon. 6, 7, 15, 16, 17, 18; 2 Andra. 71, 74, 77, 81, 82; Plow. 44 a; 45 a, 58 b, 59 b; Dyer, 23, pl. 148; 28, pl. 182; 30, pl. 8; 10 Co. 49 a, 85 a; Co. Ent. 172 b, 382 a, 389 g, 589 b; 2 Co. 36 a, 53 b, 71 b, 78 a; 3 Co. 27 a, 62 a; 4 Co. 2 a; 5 Co. 112 b, 113 a; 6 Co. 28 a; 7 Co. 9 a, 13 b, 19 b, 38 a; 8 Co. 94 a; 9 Co. 26 a; 10 Co. 49 a; 1 Bulstr. 163; 3 Bulstr. 185, 186, 252; Godb. 299; Cr. Eliz. 46, 721, 908; Cr. Jac. 401, 608; Cr. Car. 44, 218; Pop. 71, 72, 76, 77, 78; Dyer, 283, pl. 30;

1 Roll. Rep. 260, 385; 2 Roll. Rep. 105, 245; Mo. 92, 102, 196; 1 Jones, 179; 2 Bulstr. 44; Bridg. 27; Dyer, 11, pl. 45, 56; Lit. Rep. 261; Co. Litt. 326 b, 365 b, 381 b; 1 Roll. 878; 3 Co. 50 b, 51 a, 58 b; Cr. Eliz. 2, 14, 131, 514, 524; Mo. 93, 455; 2 And. 31, 44, 57; Cr. Jac. 689, 174; 1 Jones, 18, 254; Cr. Car. 244; 5 Co. 80 a; 9 Co. 141 a; 10 Co. 37 a; Plow. 50 b; 1 Hob. 299; 1 Leon. 261; 2 Leon. 168; Godb. 6; Mo. 250; 3 Leon. 78; Bridg. 27, 28, 136; 27 H. 8, 23 b; 4 Co. 8 b; Dyer, 89, pl. 2, 146; pl. 68, 147; pl. 74, 148; Hob. 166, 341; 10 Co. 39 a, b.

(f) 1 Co. 66 b; 11 Co. 80 a.

existence, by the said feoffment of the feoffees be destroyed and subverted, so that they shall never rise out of the estate of the feoffees after the birth of the issues.

And this case was argued many times at the bar in the King's Bench on both sides, and because the case was difficult and of great consequence and importance, it was thought necessary that all the justices of England should openly, in the Exchequer Chamber, upon solemn argument, show their opinion in this case. And afterwards, Ter. Hil., 36 Eliz., the case was argued in the Exchequer Chamber, before all the justices of England, by Hugh Wiat *ex parte Querent'*, and by Coke the Queen's Solicitor-General *ex parte Defend'*. And afterwards, in Easter Term following, by Rob. Atkinson, *ex parte Quer'*, and by Francis Bacon *ex part' Def'*; but I did not hear their arguments. And yet it is necessary to report what matters were moved at the bar, to the intent that the state of the question should be better understood, and the arguments and reasons of the Judges on the bench should be better apprehended.

For the argument of the principal point four things are to be considered.

1. What an use is and the several natures of uses, and of what estimation and account all manner of uses are in judgment of law.

2. If contingent uses (as well as uses in *esse*) might have been discontinued or tolled at the common law before the stat. of 27 H. 8, c. 10.

3. If our contingent use had been discontinued or destroyed, if the said statute of 27 H. 8 had not been made, inasmuch as the feoffee had notice of the uses.

4. If the said stat. of 27 H. 8 preserves any contingent use, which had been destroyed by the common law, and in that to consider the mischiefs which were before the said act, and the remedy which the makers of the act have provided by the purview thereof.

First, what an use is, and the several natures of uses, and of what estimation all uses are in law. An (*g*) use is a trust or confidence which is not issuing out of land, but as a thing collateral annexed in privity to the estate and to the person, touching the land, scil. That *cestuy que use* shall take the profits, and that the tertenant shall make estates according to his direction. So that he who hath an use hath

(*g*) Co. Litt. 272 b; 1 Mod. 39; 7 Co. 13 b; 1 Anders. 318; Plow. 352 b; Poph. 71; 1 Co. 101 b; 3 Co. 2 b.

not (*h*) *jus neque in re, neque ad rem*, but only a (*i*) confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpoena in Chancery. If the feoffees would not perform the order of the Chancery, then their persons for the breach of the confidence were to be imprisoned till they did perform it; and therefore the case of an use is not like unto commons, rents, conditions, &c., which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the tertenant, or by disseisins, or by escheats, &c., as uses may, as shall after be said.

There were two inventors of (*h*) uses, fear and fraud: fear in times of troubles and civil wars to save their inheritances from being forfeited; and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, &c.

There are two manners of uses: 1. In *esse* in possession, reversion, remainder; 2. In contingency, which by possibility may fall into possession, reversion or remainder.

To every of these uses there are two inseparable incidents—confidence in the person, and privity in estate—as appears in 14 H. 8, 6 a. And this confidence in the person is either expressed by the party or implied by the law; and so is privity in estate either expressed or implied, as shall be after showed. These uses and confidences to some respects were reputed as chattels, and therefore were devisable; and to other respects they were esteemed as (*l*) hereditaments of which there should be (*m*) *possessio fratris*, &c. as 5 E. 4, 7 b, is; but yet in law, neither (*n*) chattel nor hereditament, for they were not assets to executors nor assets to the heir. 2. Whether a contingent use might be discontinued before the statute; and it seems clearly, that before the statute uses in contingency might have been taken away and destroyed as well as uses in *esse*. And therefore, if there be feoffee at the common law to the use of me for life, and after to the use of him who shall be my first son in tail, &c., and such feoffee, before the birth of my son, had been disseised or made a feoffment upon good consideration to him who had (*o*) no notice of the use; the contingent use in the one case was suspended, and in the other case utterly destroyed. For if

(*h*) 1 Anders. 320, 343; Co. Litt. 272 b.
(*i*) 1 Co. 127 a; 2 Co. 58 b; 6 Co. 64 b;
Bac. Read. upon 27 H. 8, 5, 6, 7, &c.

(*k*) Dr. & Stud. lib. 2, cap. 22; Lane, 45;
1 Co. 131 a; Dyer, 12, pl. 51.

(*l*) 1 Anders. 316 a; 3 Co. 2 b; 4 Co.
22 a.

(*m*) Br. "Discent," 36; Plow. 58 a; Bac.
Red. sur Stat. 27 H. 8, p. 9; Fitz. "Sub-
poena," 3 Dy. 11, pl. 40.

(*n*) Hard. 492; Co. Litt. 14 b; Raym.
317; Dy. 272, pl. 43.

(*o*) 1 Co. 124 b.

uses in *esse*, which were of greater value and estimation than uses in contingency (which were but possibilities of an use), might be discontinued or destroyed as above, as the books are (*p*), 24 H. 8, Feoffm. al Uses; 14 H. 8, 6, 7; 24 & 28 H. 8, fol. 8, 9, 10, *à multo fortiori* uses in contingency and future might be discontinued and taken away. Also a contingent use was but a trust and confidence; and therefore, if confidence in the person or privity in estate fail, the use was also either suspended or destroyed; and therefore, without question, a feoffee upon good consideration without notice, disseisor, or lord by escheat, lord of a villain, corporation, an alien born, a person (*q*) attainted, shall not stand seised to a contingent use, no more than to an use in *esse* before the statute of 27 H. 8. And therefore it is agreed in (*r*) 33 H. 6, 14 b (*s*), and 31 E. tit. Collusion, 29, if the father makes a feoffment to his eldest son upon collusion, now by the statute of (*t*) Marlebridge the lord had a possibility to have the ward, if the father died, his heir within age, but if the feoffee made a feoffment over *bonâ fide*, and afterwards the father died, his son within age, there that possibility was destroyed, because the stranger who had no notice hath acquired the land *bonâ fide*. So if A. grants a reversion or seigniorship to B., now he hath a possibility to have the seigniorship or reversion; but if A. grants the reversion or seigniorship to another, and he gets attornment, now the first possibility to B. is destroyed, as (*u*) Littleton saith, fol. 126 a, but more shall be said as to this point after, in answer to certain objections of the other side. And although that in our case the feoffee had notice, yet because he was in of another estate, so that the privity of estate failed, for that reason he shall not stand seised to the use, for the use is a confidence annexed in privity to the estate of the land. (*x*) And therefore there is a difference between things annexed in privity to the estate of the land, and things annexed to the possession of the land, without respect of any privity: and therefore (*y*) a disseisor, abator or intruder shall not be seised to an use, although he hath notice; for the use was not annexed to the possession of the land which each of them hath, but to the privity of the estate which is denied to them all, for they are not *in* in privity of the estate

(*p*) 1 Anders. 313; 24 H. 8; Br. "Feoffment al Use," 40; Co. Litt. 19 b; 2 Co. 78 a; 1 Co. 122 a; 3 Bulstr. 185; Cro. Jac. 401; 1 Roll. Rep. 322, 333, 337.
(*q*) Jenk. Cent. 195; Co. Litt. 19 b; Dyer, 283, pl. 31; 2 Co. 78 a; 3 Bulst. 185; Mo. 390, 848; Cro. Jac. 401; 1 Roll. Rep. 332, 384; Roll. 780; Godb. 269.

(*r*) Fitz. "Collus." 36; Br. "Collus." 5; Br. "Garde," 5, 11 C; 2 Co. 94 a.

(*s*) 6 Co. 76 a.

(*t*) Marlbr. cap. 6; 2 Inst. 109, 110; 2 Co. 78 a; 8 Co. 164 b.

(*u*) Litt. sect. 552; Co. Litt. 310 a.

(*x*) 1 Anders. 312; 1 Co. 120 b.

(*y*) 1 Co. 139 b.

to which the use was annexed but in the post. Also forasmuch as *cest' que use* had no (z) remedy but in Chancery, and the Chancellor hath no power to determine the right of inheritances, for that reason they can stand seised to no use. The lord by escheat, or lord of a villain, or who enters for mortmain, or who recovers in a *cessavit*, &c. shall not stand seised to an use, because he is in by title paramount to the use; sc. by force of a condition in law tacitly annexed to the land at the time of the creation of the seignior, and the tenancy came in lieu of his seignior which he had to his own use; and the writ of escheat saith, and which *ad ipsum reverti debent tanqu' escaeta sua*. And also they are not *in* in the per, that is to say, in privity of the estate to which the use was annexed, but in the post. The lord (a) by escheat, &c. loseth his seignior; so tenant by the curtesy (b), and tenant in dower, shall not be seised to an use, for the law gives them their estates in consideration of marriage, and they are not *in* in privity of the estate; for which see 14 H. 8, 6, 7, and 24 H. 8, Br. Feoffments *al Uses*, 40.

So if there be privity in estate, yet if confidence, either expressed or implied, fail in the person, the use is suspended or destroyed. If the feoffee to an use upon good consideration enfeoffeth another who hath no notice, here is privity in estate, but here is no confidence in the person either expressed or implied, and therefore the use is gone; but if a feoffment be made without consideration to one who hath no notice, there is privity in estate, and the law implies notice, and therefore the use remains, but not as a thing annexed to the land, but to the privity of the estate, 5 E. 4, 7 b. If the husband makes a feoffment in fee of the land of his wife upon consideration, and without expressing any use, the wife shall not have a subpœna; for the feoffment doth disaffirm the wife's right, and the feoffee is not *in* in privity of the estate of the wife. So in the case at bar, tenant for life, the remainder in fee to the use of another—tenant for life makes a feoffment in fee to one who hath notice; he cannot stand seised to the first use, because the use is annexed to one estate, and the feoffee is *in* of another estate. It is agreed in 45 E. 3, 18 b, that if (c) donee in tail with warranty makes a lease for life, and afterwards, in a præcipe

(a) Co. Litt. 272 b.

(a) Jenk. Cent. 195.

(b) 1 Roll. Rep. 332, 333, 385; 1 Anders. 313; Co. Litt. 19 b; 2 Co. 78 a; 1 Co. 121 b; Bulstr. 185; Cro. Jac. 401.

(c) Doct. Pla. 24; Fitz. "Garranty," 17; Br. "Scire Fac." 206; Br. "Barre," 13; Hob. 25, 26; 3 Co. 5 b, 6; 2 Roll. 742; Co. Litt. 385.

brought against the lessee for life, he is received upon the default of the lessee, he shall not vouch by force of the warranty, for the warranty is annexed to one, and he is in of another estate, and always the warranty as to voucher requires privity of estate to which it was annexed. And the same law of an use. So it is held in 10 Eliz., Plow. Com. 351, that *cestuy que use*, for life or in tail, remainder in tail, with divers remainders over in use, makes a feoffment to one who hath notice, he shall not stand seised to the first uses, *causa qua supra*. But of things annexed to land it is otherwise, as of commons, advowsons, and the like appendants or appurtenances. And therefore if tenant in tail, or the husband seised in the right of his wife, makes a feoffment of a manor, or part thereof, with the advowson, the advowson, at least after presentment, shall pass as appendant to the manor, or to part of the manor, as the books are in 23 Ass. 8, 34 E. 1, tit. Qu. impd. 179, 43 E. 3, 25, 26, and 17 E. 3, 5 a, 19 b; and not to the estate of the land, for the estate of the land is discontinued by the feoffment; so a disseisor, abator, intruder, or the lord, by escheat, &c., shall have them as things annexed to the land. So note a diversity between an use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons and other hereditaments annexed to the possession of the land: then, 3. Forasmuch as if the statute of 27 H. 8 had not been made, the contingent use in the case at bar had been taken away.

Let us now see whether the stat. of 27 H. 8 hath provided for the preservation and maintenance of contingent uses against the rule of law before; for if the stat. doth not support the contingent use in the case at bar, without doubt the same is taken away. And, therefore, two things are necessary to be considered for the better discussion of this point.

First, the mischiefs which were before this act, and which the makers of the act did intend to remedy; and,

Secondly, what manner of remedy they have provided for it; and from thence will arise the true interpretation of the letter and meaning of the act.

And for the better apprehension of the mischiefs which were before this act, certain former statutes made against the abuses of uses in particular cases (for the treatise shall be only of uses) are to be considered. And thereby the abuses of such uses will fully appear, and that fraud was the principal cause of the invention of them in subversion of law and justice.

By the stat. of (*d*) 1 R. 2, c. 9, it is provided, that because disseisors make feoffments to great men and others, for maintenance, and to other men unknown, to the intent to delay or defraud the disseisees, in such cases the disseisee shall have his action against the pernor of the profits (which was *cestuy que use*), notwithstanding such feoffment by fraud and collusion within the year. The stat. of (*e*) 4 H. 4, c. 7, enlarges the stat. of 1 R. 2 in the time and in the actions also; the stat. of (*f*) 11 H. 6, c. 4, explains it. The stat. of (*g*) 1 H. 7, c. 1, gives a formedon against *cestuy que use*, who is called the pernor of the profits; and by those acts it appears, that fraud and deceit to defeat him, who had good title and right to the land, of his lawful remedy, was the (*h*) inventor of these feoffments to uses. It was provided by the statute *De (i) religiosis*, 7 E. 1, in enlargement of the stat. of (*k*) *Magna Charta*, cap. 36, which had provided, *quod non liceat alicui dare terram alicui domui religiose*, that they should not acquire to them lands or tene-ments *aste vel ingenio*, &c.; but to defraud both those laws it was invented, that a feoffment should be made to the use of religious men, or commonalties; and therefore was the stat. of (*l*) 15 R. 2, cap. 5, made to remedy that fraud. By feoffment to uses, lords were defrauded of their wards, until the stat. of (*m*) 4 H. 7, c. 17. The stat. of (*n*) 19 H. 7, c. 15, recites, that men were defrauded of their executions, the lords of their reliefs and heriots, and the lords of villains of the purchases of their villains by feoffments to their uses, and that statute doth remedy those mischiefs.

The stat. of (*o*) 1 R. 3, c. 1, which is more general than the other statutes, intends to remedy four great mischiefs by reason of secret feoffments to uses:—1. Danger to purchasers and other the king's subjects; 2. Trouble; 3. Costs; 4. Grievous vexations; so that it was not only danger, but danger with trouble; and not danger with trouble only, but danger with trouble and costs; and not danger with trouble and costs only, but with great vexation. Also examples thereof are expressed in the preamble of the act, no purchaser of lands in perfect

(*d*) Co. Litt. 369 a; Dyer, 295, pl. 11; 2 Inst. 445; 1 Co. 131 a; 14 H. 7, 17 b.

(*e*) 12 H. 4, 21 b; 2 Inst. 445.

(*f*) 2 Inst. 445.

(*g*) Plow. 178 a; Kelw. 101 b; 11 Co. 62 b; 2 Bulstr. 63; F. N. B. fo. 212 a; 1 Co. 131 b.

(*h*) 1 Co. 121 b.

(*i*) 3 Bulstr. 45; Co. Litt. 2 b; 2 Inst. 429.

(*k*) 2 Inst. 74, 75; Vet. N. B. 160 b.

(*l*) 8 H. 4, 14 b.

(*m*) Rast. "Wards," 20; Litt. s. 115; F. N. B. 59 a, 122 k; Vet. N. B. 94 a; Kelw. 86 a; 13 H. 7, 11 a; 12 H. 7, 19 a; Co. Litt. 84 b.

(*n*) Doct. & Stud. 140 a; Litt. s. 126, 173; Co. Litt. 91 a, 117 a; Vet. N. B. 94 a.

(*o*) 1 Co. 101 b.

surety, no wife of (*p*) dower, no lessee of his lease, no servant of any annuity granted to him for his service, &c., by reason of these privy and unknown uses; this statute intended to provide for these mischiefs in establishing all feoffments, grants, &c., made by *cestuy que use*, &c. But so mischievous and sinister is the invention and continuance of uses, that they also overreached the policy and providence of the makers of this act also; for, for example, the purchaser was not in a better case than he was before, for if the feoffor limit to himself but an estate for life or in tail, or to his wife, or to his son, &c., or if the feoffees made secret leases or estates, the purchaser could not have a sure estate, by any estate that *cestuy que use* could make; so that danger, trouble, costs and great vexation remained in the realm by these covinous and fraudulent uses, notwithstanding the said stat. of (*q*) 1 R. 3. For the remedy of which and many other mischiefs, was the stat. of 27 H. 8, cap. 10, made, for the general remedy of all mischiefs and abuses of uses, which act was divided into two general branches, viz. the preamble, which expresses the mischiefs, and the body of the act, which provides the remedy.

The preamble contains these mischiefs:—

1. By common law, lands or tenements cannot pass but by solemn (*r*) livery or matter of record, or by sufficient writing if the thing lies in grant. Now by divers and sundry imaginations, subtle inventions, and practices by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and purposes (so that the feoffment, fine and recovery are called fraudulent, because they were suffered and made to fraudulent uses), the hereditaments of this realm were conveyed from one to another upon (without) solemn livery, &c.

2. By last (*s*) wills, sometimes by bare words, sometimes by signs in great extremities.

3 (*t*). By these fraudulent uses many heirs have been unjustly disinherited.

4 (*u*). Lords have lost wards, marriages, reliefs, and in effect all the fruit and benefit of their seigniories, notwithstanding the said statutes

(*p*) Perk. 349; 4 Co. 1 b.
 (*q*) 1 R. 3, c. 1; 1 Co. 101 b.
 (*r*) 1 Anders. 322; Co. Litt. 48 a; Litt.
 a. 55.

(*s*) 1 And. 324.
 (*t*) 1 And. 323.
 (*u*) 1 And. 323.

of (x) 4 H. 7 and (y) 19 H. 7, which intended to remedy part of this mischief.

5(z). No purchaser could be assured of any lands, notwithstanding the said act of (a) 1 R. 3, which intended to remedy it.

6(b). Nor could any man know against whom he should bring his action, or have his execution, &c., notwithstanding the said stat. of (c) 1 R. 2 (d), 4 H. 4 (e), 11 H. 6, 1 H. 7 and (f) 19 H. 7, which were made one after the other, to provide a remedy against this mischief.

7(g). Estates created by law in consideration of marriage were defeated, *scil.* tenancy in dower, and by the curtesy, notwithstanding the stat. of (h) 1 R. 3, which intended to remedy the same in part.

8. Perjuries for trial of secret uses were committed, and daily increased.

9. The king had lost the benefit of escheats by attainder, purchases by aliens, wards, *annum, diem, et vastum*, &c.

10. And the lords had lost their escheats also.

11. The statute saith, that many other inconveniences have happened, and daily increase amongst the king's subjects, to their great trouble and inquietness, and the utter subversion of the ancient common laws. These were the mischiefs; but what remedy did the makers of the act intend to provide for all these and infinite other mischiefs, which subtle and fraudulent uses had introduced, surely to extirpate and extinguish (for so speaks the statute) these subtle practised fraudulent feoffments, fines and recoveries, abuses and errors, and to make a plain and perfect restitution of the ancient common law, which was in a manner subverted by them; and to the intent, that the king or any of his subjects (as the statute speaks) should not be by any means or inventions deceived, damaged, or hurt by reason of such secret, subtle, and fraudulent uses, trusts, and confidences: so that the full intent of the makers of the act of 27 H. 8, was for a remedy of all the said mischiefs (which no statute before, nor all of them together had made a sufficient provision for), to extirpate and extinguish all uses in such manner as the statute hath limited. For the makers of the statute of 27 H. 8, having maturely examined the said former statutes and provisions by parliament to

(x) 4 H. 7, c. 17.

(y) 19 H. 7, c. 15.

(z) 1 And. 323.

(a) 1 R. 3, c. 1.

(b) 1 And. 323.

(c) 1 R. 2, c. 9.

(d) 4 H. 4, c. 7.

(e) 11 H. 6, c. 4.

(f) 19 H. 7, c. 15.

(g) 1 And. 323.

(h) 1 R. 3, c. 1.

reform the great abuses of uses in many particular cases, at last resolved, that uses were so subtle and perverse, that they could by no policy or provision be governed or reformed ; and therefore as a skilful gardener will not cut away the leaves of the weeds, but extirpate them by the roots, and as a wise householder will not cover or stir up the fire which is secretly kindled in his house, but utterly put it out ; so the makers of the said stat. of 27 H. 8, did not intend to provide a remedy and reformation by the continuance or preservation, but by the extinction and extirpation of uses ; and because uses were so subtle and ungovernable, as hath been said, they have with an indissoluble knot coupled and married them to the land, which of all the elements is the most ponderous and immovable. It would be then against the express intent of the makers of the act, to preserve uses otherwise than they were by the common law, for they intended *sub modo* to extirpate and extinguish them. And if, by any construction out of this act, contingent uses should be preserved,—1. Greater inconveniences would follow than were before. 2. Great absurdities would from thence likewise ensue.

For, 1. Land would pass against the rule of the common law, from one to another so easily, and upon such secret conditions and limitations, that no person could know in whom the estate of the land did remain.

2. Land would pass and be transferred by nuncupative will from one to another ; as if a feoffment in fee be made to such persons as he shall name by his last will, &c., he might limit the uses by will nuncupative.

3. Heirs would thereby be disinherited ; for if these perpetuities should be adjudged of force, it is impossible (if they be not wrote on the walls of their houses, and if the parties which are bound by them have not counsel learned in the law always with them) for them to observe the nice and precise points of the usual provisoes and clauses of restraint contained in perpetuities.

4. Lords would lose their wards and fruits of their seigniories.

5. No purchaser would be assured of his purchase, and where the statute intends to provide that the king nor any of his subjects shall be deceived by these uses ; now the purchaser will be in a worse case than he was before, for before the statute, if he had purchased it *bonâ fide* without notice, as hath been said, he should not stand seised to the use ; now it is said, that the land shall be bound with the use in whose hands soever it shall come, so that where the preamble says, that

the subject shall not be damaged by these uses, he, by such construction, will be more damnified than he was before.

6. Greater mischief would follow from strangers' actions than was before; for upon a secret limitation of uses the land itself would be transferred from one to the other, so that no man in the world could know in whom the estate of the land is. But before this statute, although they might change the use, yet they could not convey the land upon (without) livery, fine or recovery; but now the land itself would pass by performance of a secret condition in his chamber.

7. No person shall be tenant by the curtesy, nor tenant in dower; for they do not know in whom the estate of the land remaineth.

8. Of necessity, perjuries, by reason of them, will abound; for now the secret imagination and intent of men, and attempts and goings about, shall be put in trial upon these clauses of restraint.

9. The king and lords shall lose their wards and escheats; for such devise may be made, if the statute shall be construed for the preservation of contingent uses, that neither the king nor any other lord shall ever have escheats or wards, or in effect any profit or fruit of their seigniories.

10. It would be absurd to say, that the makers of this act intended to preserve uses, when they expressly say, that they intend to extirpate and extinguish uses. Also it is absurd to think, that the makers of this act intended to preserve, *et quodam modo* to revive, the ancient common law, and yet intended to preserve or continue any such abuse and fraud which tendeth to the overthrowing of the common law. For they have declared, that the invention of these uses was subtle, fraudulent and crafty, in disinherison of heirs, in defrauding of lords, of those who had right of their lawful actions, of purchasers, of tenant in dower, of tenant by the curtesy, causes of manifest perjury in defrauding the king and lords of their escheats, &c., in subversion of the ancient common laws, and the cause of many other inconveniences, and the occasion of great trouble and disturbance in the commonwealth. I say, it would be absurd to think that the makers of the act intended not only to continue, but to increase and preserve such wickedness, mischiefs and inconveniences. It appears also, by divers branches of the body of the act, that the makers of the act did not expect that any land, after the statute, should pass by limitation of uses, unless only uses upon bargain and sale, which they thought convenient to continue. And, therefore, they did at the same parliament add to *this* enrolment of record, which is agreeable to the preamble, *scil.* matter of record;

but other uses they did not expect would, after the act, have been put in ure, but that the land should pass by solemn livery, record, &c., as is contained in the preamble. And they thought also, that little land would pass by bargain and sale enrolled, because such bargainee, being in *in* the post, shall never (i) vouch by force of any warranty annexed to the estate of the land. And, therefore, it is to be observed, that there is not in the whole body of the act any saving for any *cestuy que use*, or of any use. Observe also, the act doth not give any benefit of warranty to *cestuy que use*, unless the use was executed before 1 *Maii*, 1536, which was 28 H. 8, as fully appeareth by an express clause towards the end of the said act of 27 H. 8. Provision also is made by another clause of the act for actions then depending, that they shall not abate by execution of the use. And if they had expected that uses should continue, they would have provided for future actions also. Also, there is another clause in this very act for the provision of the king's wards (now being within age, &c.). And the last clause of the act concerning Wales, *scil.* (now stand or be seised), prove the same also, that they did not expect that any uses should continue, unless in the case of bargain and sale, and in case of entry by feoffees before the statute to revive the former use. And these words in the beginning of the purview of the act, and in several other parts of this act, *scil.* (where any person or persons stand or be seised, or at any time hereafter shall happen to be seised), do not prove that the makers of the act expected that uses would be as common and usual after the act as they were before, but by these words (hereafter seised) that they intended by entry of the feoffees to revive an use created before the act; and that is notably expounded by the first saving of this act, for there is saved to all persons, &c., all such rights, &c., as they or any of them had or might have had before the making of this act; so that such rights, &c., which precede this act, and were in *esse* before 27 H. 8, are only saved by the act of 27 H. 8, for they did not intend that lands should pass by limitation of use, but by solemn livery, matter of record, &c., as is expressed in the preamble. And therefore, if, after the statute, A. had disseised B. and enfeoffed C. to the use of D. in fee, the right of B. is not saved by the express letter of the act, for the right was not former or precedent to the act; so that, for maintenance and continuance of conveyances by uses after the act, there ought to be a construction by equity; for the makers of the act intended to extirpate and extinguish all uses, unless in the case of bargain and

(i) Cro. Car. 370; 3 Co. 62, 63; Hob. 27; Mod. 193.

sale as aforesaid. The which is said to this intent only to show the expectation of the makers of the act, and by that to collect their intent and meaning concerning the preservation of any use, and not to draw in question such uses in *esse*, which are raised upon good consideration, after this act, and lawfully executed by the letter of this act; for it is not intended to destroy any use, either in *esse* or in contingency, but by the said rule of law before the statute of 27 H. 8. Now, inasmuch as the mischiefs before the act, and the remedy which the makers of the act intended to apply, are understood, the purview, and the words of the act by which the remedy is provided, is to be considered; and it is to be known that these words of the purview, "it may please the king's highness that it may be enacted," &c., depend upon two sentences of the preamble before, *scil.* "for the better extirpating and extinguishing of all such subtil practised feoffments," &c., and "to the intent that the king's highness, nor any of his subjects, may be deceived by reason of such trust, uses or confidence. It may please the king's highness." So that the way to extirpate the uses, and to avoid the deceit of them, provided by the act, is now to be seen; and that is, "that where any person stand or be seised of any lands, tenements, &c., that in every such case all and every such person, &c., that have, or hereafter shall have, any such use, &c., shall from henceforth stand and be seised, and adjudged in lawful seisin, estate and possession, of and in the same lands and tenements of and in such estates as they had in the use; and that the estate, right and possession that was in such persons as were, or hereafter shall be, seised to the use of any such person or persons, be from henceforth clearly deemed in *cestuy que use*, after such quality, manner, form and condition, as they had in the use."

And that is the remedy which the makers of this act have provided to salve all the said mischiefs; by which words of the purview of the act it clearly appeareth, that every use in *esse*, *scil.* in possession, reversion or remainder is executed by the statute, and that no contingent use or right of an use shall be executed within this statute until they come in *esse*. For to every execution of an use by force of this statute four things are requisite. 1st. There ought to be a person seised; for the words of the act are, any person stand or be seised, &c. 2ndly. There ought to be a *cestuy que use* in *esse*; for the words of the act are, stand seised to the use of any person or persons, &c. 3rdly. There ought to be an use in *esse*, *scil.* in possession, reversion or remainder. 4thly. The estate out of which the uses rise ought to be vested in

cestuy que use; for the words are, and that the state of such person seised to the use shall be adjudged in *cestuy que use*, &c.; so that when these four concur, *scil.* seisin in feoffees, *cestuy que use in rer' natura*, an use in *esse*, and that the estate of the feoffees may vest in *cestuy que use*, there is execution of the use within this statute: but if any of them fail, there is no execution of the use within this statute; and, therefore, it is agreed in 10 Eliz., Plowd. Com. *Dalamer's Case*, 351 b, that the statute of (j), 27 H. 8, doth not execute any use, but only uses in *esse*; so a right of a present use, or a future or a contingent use, are excluded until they come in *esse*. It is held in 36 H. 8 (k), Dyer, 58 a, that if *cestuy que use* in tail with divers uses in remainder makes a feoffment and dies, and the statute of 27 H. 8 is made, now the issue in tail hath the right of any use in *esse*, as the Justices termed it, 10 Eliz., in *Dalamer's Case*; but no execution thereof until entry by the feoffees. And therewith agree the cases in (l) 7 E. 6; *Stephen Daves's Case*, Dy. 88 b and 15 & 16 Eliz. (m); *Dame Bashervill's Case*, Dyer, 330 a, that if *cestuy que use* in possession makes a feoffment before the statute no right of an use, neither in possession nor in remainder shall be executed by the stat. of 27 H. 8, till regress by the feoffees—*Quid ita?* There ought to be seisin in the feoffees, *cestuy que use in rerum natura*, an use in *esse*, and the estate of the feoffees ought to be transferred to *cestuy que use*; and, therefore, admitting our case had been before the stat. of 27 H. 8, and that our feoffment was before the statute, and, after, the statute was made, without question this use could never be recon- tinued or the repossession of the land executed to it by the statute; then if the statute doth execute only uses in *esse*, and neither the right of an use in *esse*, nor an use in contingency, *ex hoc sequitur*, that the right of an use and uses in contingency remain at the common law until they come in *esse*, and therefore, if the estate of the feoffees be devested by desseisin, or if the Queen or a corporation, or an alien, or a person attainted, &c. be enfeoffed before the use come in *esse*, or if the land be aliened *bonâ fide*, upon consideration to one who hath no notice, the use shall never be executed, unless these possessions be removed by lawful entry or action of the feoffees. And if their entry and right be barred the use is gone for ever, as it was at the common law before this statute. And therefore, if *cestuy que use*, in tail, remainder in tail, restrained with clause of perpetuity, be disseised, no use in contingency

(j) Rastal. Uses, 9; 2 Sid. 65.

(k) Dyer, 58, pl. 5.

(l) 1 Co. 35 a.

(m) 1 Co. 128 b; 1 And. 330; Dyer, 329, pl. 17; Hob. 256, 345.

can be executed of this estate, for a disseisor cannot be seised to an use; and then there wants seisin in the feoffees, and there wants an use in *esse*, for there is but a right of an use, and it is impossible that the estate of the feoffees can be vested in *cestuy que use* by the act of 27 H. 8, when they have not any estate in them when the use shall be executed. And there is no difference as to the execution of an use by force of this statute when the use is discontinued before the statute, and when the estate of the land is altered after the act and before the contingent use comes in *esse*. And yet a more colourable argument may be made for the execution of the right of a present use by force of this act (as where feoffees were disseised before the statute) than for the execution of a contingent use after the act being divested by disseisin before they come in *esse*; for the words of the act are, "and the estate, right and possession that was or hereafter shall be in such person seised to any such use, shall be in *cestuy que use*," &c. So that when the feoffees are disseised before the statute, and, after, the statute is made, now the feoffees have a right to the land, and *cestuy que use* a right to the use; and the statute saith, that the estate, right and possession that was in the feoffees shall be in *cestuy que use*, and they before the disseisin had the estate, and after the disseisin had a right; but this clause is to be conjoined with the first branches of the act, and because seisin fails in the feoffees, an use in *esse* in *cestuy que use*, and the estate continued, all concurring at the time of the execution, there cannot be any execution within this statute. And yet at several times there was seisin in the feoffees, and use in *cestuy que use*, and seisin for a time, but they do not meet together when the use should be executed; and for this reason in the said case the use cannot be executed within this statute; but the case at the bar is stronger, for in this case there was never an use in *esse* in the son of Christopher before the discontinuance and divesting of the estates. And suppose before the statute a feoffment in fee had been made to the use of J. S. for life, and after to the use of the right heirs of J. N. and the feoffees had been disseised, and, after, the statute was made, and then J. N. died, and after his death J. S. died, shall this use be executed in the right heir of J. N.? No truly, for the reason before rehearsed: then by the same reason, if the disseisin had been in the same case after the statute and before the death of J. S. (for no execution can be during his life), no possession shall be executed in the right heir of J. S. within this statute. By this it appeareth of what moment their objection is, who say, that after the statute of 27 H. 8, the

land is bound with the contingent use in whose hand soever it shall come, for that objection is grounded upon five absurdities.

1. The use shall be annexed to the land, and not to the estate of the land; and by the same reason, a person attainted, an alien, the king (n), a corporation, the lord by escheat, &c., might after the statute be enfeoffed or seised to the use of another, if the land only was bound with the use, for they shall have (o) commons, advowsons, estovers, &c., as things annexed and appurtenant to the land; and what reason shall it be, that a person attainted, corporation, &c., could not originally be as well enfeoffed to the use as they shall stand seised to former contingent uses, but *eadem est ratio* of the creation of an use, and of the continuance of an use?

2. The statute requires (as hath been said) that there be an use in *esse*, and an use is but a confidence and trust, for so the words of the statute expound it in joining those words together, that is to say "use, confidence, and trust;" but it is absurd to say, that confidence and trust can be reposed in land which wants sense, and which in regard of sense is inferior to brute beasts; and it would be less absurd to say, that beasts may be trusted who have sense and want reason, than land which wants sense and reason also should be trusted.

3. If the land shall be bound and charged therewith, as with a rent, common or interest, in the judgment of law, then that in effect would overthrow all uses, for then how can one by the law, by deed indented made between two, covenant to stand seised to the use of a stranger to the deed? for if it shall be as a charge out of the land, it shall be void, for he is a stranger to the deed; and how can a man after the statute, covenant to stand seised to the use of himself for life, or in tail, the remainder over? for a man by the rule of the law cannot create in himself a particular estate, nor give himself any estate in possession or remainder (unless peradventure in some cases by conclusion); but, inasmuch as uses after the statute are but trusts and confidences, the law tolerates them so long as they agree in the declaration and limitation of their estates with the rule of the law.

4. If the nature of an use be changed, and a new hereditament made by construction upon this statute, then if (p) a man makes a feoffment of

(n) Jenk. Cent. 195.
 (o) 1 Co. 121 b; Co. Litt. 272 b; 2 Co.
 58 b.
 (p) Co. Litt. 13 a, and n. (2), Ib. 2, 172,
 (23), 23 a; 2 Roll. 708; Dyer, 184, pl. 9;

1 Co. 88 a, 100 b; Hob. 31; 13 Co. 56; 8
 Co. 54 b; 5 Ed. 4, 7 b; Fitz. "Subpœna,"
 2; Br. "Descent," 11; 7 H. 6, 4 b; Br.
 "Feoffment al Use," 32; Dall. 61, pl. 14;
 2 Co. 58 a.

land on the part of the mother without consideration, his heir on the part of the father shall have it; but it was agreed of late, in case between (q) Colgate and Blythe, in *Communi Banco*, M. 29, & 30 Eliz., that the heir on the part of the mother, shall have it after the statute, as he should have before the statute, as 5 E. 4, 7 b, is.

5. If the law shall be taken, that the land shall be bound with the contingent use, into whose hands soever it shall come, this absurdity and confusion would be. Suppose there is tenant in tail, the remainder or reversion over in fee, and he in the remainder or reversion covenants by deed upon good consideration, that if tenant in tail dies without issue within four years, that he will stand seised to the use of B. in fee, and afterwards tenant in tail makes a feoffment in fee, and the feoffee covenants by deed with C., that if tenant in tail dies without issue within the said four years he will stand seised to the use of C. in fee, tenant in tail dies within the four years, who shall have the use in this case? certainly there cannot be two several uses in possession, in two several persons at one and the same time, in one and the same land, for then it will follow that there will be two several estates in possession in two several persons at one and the same time; for if the feoffee to an use before the statute had bargained and sold the land upon good consideration to one in fee who had no notice, and executes no estate, the bargainee shall not have any use, but the ancient use continues, for there (r) remains privity of estate and confidence also. And there cannot be two several uses of one and the same land, in one and the same degree; and therefore it seems, in the case which hath been put, the use of the feoffees shall be executed, and not the use of the remainder or reversion, for both uses cannot meet in ~~esse~~ together of one and the same land, and therefore they are compelled to confess that the future use in this case may be taken away. And if it be so in the case of tenant in tail, the remainder over, so is it in the case of lessee for life. And therefore if lessee for life be, the remainder over in fee, and he in the remainder covenants with B., by deed upon good consideration, that if lessee for life dies within four years, that, then he will stand seised to the use of B. in fee; and afterwards lessee for life, makes a feoffment in fee, and the feoffee makes the like covenant with C. as is aforesaid, and afterwards the lessee dies within the four years, none can deny but that the use of the feoffee shall be executed, and not the contingent use limited to B., for other-

(q) 9 Co. 126 b.

(r) Co. Litt 271 b; 1 Co. 136 b.

wise confusion would follow. And that is all one with the case at the bar in effect, for in that before the contingent use came in *esse* the lessee for life made a feoffment in fee, so that the contingent use which should rise out of the reversion or remainder could not rise until the estate was recontinued, and revested; and for the reason thereof a notable case, between (s) John Hunt, and Thomas Gateley, was adjudged by all the justices of Eng. M. 34 & 35 Eliz., at Hertford term, which case began Pasch. 23 Eliz. And it was in effect, that there was tenant in tail, the remainder over in tail, he in the remainder chargeth it with a rentcharge or lease, and afterwards tenant in tail suffered a common recovery, and dieth without issue, the possession of the recoveror shall not be (t) charged with the lease or rent, for the possession and the new estate of the recoveror, which he hath gained from the tenant in tail, is subject to the charges and leases of the recoveror, and cannot be subject to the leases and charges of him in the remainder also (u) *simul et semel*; so in the same case it was agreed, that if tenant in tail hath made a feoffment, the estate and possession of the feoffee, so long as the same continues, is not subject to the charges and leases of him in the remainder, but during the continuance thereof remains subject only to the charges and leases of the feoffee; for there it was held, that, until the estate out of which the charge or lease is derived be recontinued, the lessee cannot enter, nor the grantee distrain, *ex quo nota*, that although the use shall be (as is imagined as a charge out of the land), yet it cannot begin until the estate out of which it issues be recontinued. Then it will be demanded when the entry of the feoffees is requisite and lawful after the statute of 27 H. 8, and when not? and as to that there are divers opinions. Some think that the entry of the feoffees is not requisite after the statute to the execution of a future use, but when the estate out of which the use riseth is disturbed or altered by disseisin, or aliened to one who hath no notice; but if the estate continues without such alteration, then the entry of the feoffees is not necessary; and with this diversity agree the Lord Dyer and Manwood, in 17 Eliz. (v), Dy. 340, where they both took the same difference, when the feoffees ought to enter into the lands to

(s) 1 Co. 62 b; Poph. 5; Jenk. Cent. 260; 4 Leon. 150; Mo. 154; 1 And. 282; Goldsb. 5; 2 Co. 52 b; 10 Co. 42 b; 2 Roll. Rep. 221.

(t) Noy, 10; 3 Keb. 288, 289; 2 Co. 52 b; 6 Co. 42 a; Cr. Jac. 592; Cr. Car. 103; Poph. 5; Palm. 139; Winch. 41; 2 Roll. Rep. 221; Plowd. 350; Sugd. Gilb. Uses,

54, 381; 1 Sand. 26, 28, 32, 43; 1 Co. 62 a;

(u) 1 Co. 62 b; Goldsb. 8; Poph. 6.

(v) Dyer, 340, pl. 48; 1 Co. 101 a; 2 And. 198, 199; 2 Leon. 14; 1 Co. 134 b, 136 a; 1 And. 316; Lit. Rep. 290, 321; Mo. 391; Poph. 73; 2 Roll. 797; 2 Sid. 157.

awake the sleeping use, and when not; and their reason is because there ought to be an use in *esse*, and not a right of an use, and the estate of the feoffees ought to be transferred to *cestuy que use*, and this seems clear and without question. And others have taken this difference, when the feoffees by their entry may gain their ancient fee-simple, out of which the uses rise, there entry is congeable, otherwise not, for the law (as they affirm) will not suffer fractions of estates, and particular estates, to be created without donors or lessors; and to prove this difference, first they cite *Dalamere's Case*, Plow. Com. 350 (*w*), which was thus in effect: R. Dalamere, and Beatrice his wife, being *cestuy que use* in special tail, the remainder of the use to R. Dalamere in general tail, the remainder of the use to S. Dalamere in fee; R. Dalamere, 26 H. 8, did enfeoff Dial, who before the statute enfeoffed Lyster, who enfeoffed S. Dalamere, who, 3 E. 6, enfeoffed Barnard in fee; R. Dalamere died, and Jennings, the surviving feoffee, entered for the reviving of the uses; and it was adjudged that his entry was lawful, for there he gained his ancient fee-simple, for it was agreed by all that the feoffment of S. Dalamere was not within the stat. of 1 R. 3, because he had only an use in remainder, and he who hath but an estate in use in remainder or in reversion (as it is there agreed) cannot make an estate over by the stat. of 1 R. 3, although the words of the statute are general, every feoffment, gift, grant, &c.; for he cannot make a feoffment, and a grant of the fee simple of the land he cannot make, for then would follow fraction of the estates of the feoffees, and particular estates, without donor or lessor.

And if A. be *cestuy que use* for life, the remainder of the use to B. in fee, if B. may grant the like estate of the land as he had in the use by the stat. of (*x*) 1 R. 3, then it would follow that the grantee of B. should have the fee simple of the land, and the feoffees, who before had a fee simple, should have now but an estate for the life of A., which would be absurd and inconvenient. Also some say, that if there be tenant for life, remainder in fee to the use of B., and before the statute he in the remainder disseised lessee for life, and, after, the statute is made, the statute shall not execute the use of the remainder, for the use riseth entirely out of both the estates, and there shall not be a fraction, neither of the use nor of estate, for then he in the remainder would be a disseisor for life only, and the remainder executed to another, which would be against the rule of the law; and such con-

(*w*) 1 And. 330, pl. 350.

(*x*) 1 R. 3, 1.

struction is to be made that the rules of law be not broken. So if there be two joint feoffees to the use of another, and one disseiseth the other before the statute, and, after, the statute is made, there shall not be a fraction of the estate of the feoffee for one moiety, nor a breach of the jointure, for the statute of 27 H. 8 saves the warranty, which by such fraction of the estate would be lost. And also the statute saith, that the estate which was in the feoffee shall be deemed in *cestuy que use*, and that cannot be if there shall be such fraction of the estate of the feoffee. And they cited the case in M. 15 & 16 Eliz. (y), Dy. 329 and 330, which was cited for the opinions of Catlyn and Dyer, Ch. Just., Saunders, Ch. Baron, and Manwood, Justice, without any open argument upon a case referred to them out of the Chancery, where the case in effect was such,—A. *cestuy que use* in tail, the remainder of the use to B. in tail, the remainder of the use to A. in fee. A., before the statute, makes a feoffment to the use of himself for life, and after to the use of his eldest son and his wife, and to the heirs of the body of the son, &c., and afterwards the statute is made, the father dieth, the first feoffees enter, intending to have revived the first use in tail, and so to have excluded the son's wife (which was the Lady Baskervill) of the use limited upon the second feoffment. But it was resolved, that their entry was not lawful, because by the feoffment of A., who was *cestuy que use* in tail in possession (and also had the fee simple of the use). The fee simple of the use was lawfully departed with, and as to that, the right of the feoffees bound by the statute of 1 R. 3, then the feoffees by their entry could not have their former estate, *scil.* the fee simple, but should have a particular estate without donor or lessor, for which reason their entry was not lawful; for the said Justices took it, that when *cestuy que use* in possession makes a feoffment, the same, by the express letter of the statute of 1 R. 3, bars the entry of the feoffees for the fee simple, and by consequence the law will not suffer any division or fraction of the estate of the feoffees, for this reason their entry was not lawful. But see *Dalamer's Case*, 10 Eliz., Plow. Com. 350, upon solemn argument and great deliberation adjudged contrary. But others think it is not impertinent to say, that by the act of parliament the estate of the feoffees shall be divided, and it is not to be resembled to cases at the common law; and if other construction should be made, it would be against reason and common allowance, and great absurdity would, as

(y) 1 Co. 126 a; 1 And. 330; Dyer, 329, pl. 17; Hob. 266, 345.

they conceived, from thence ensue; for they said, that if a man (z) covenants by deed with another, that after his death his son shall have his land in tail, that in this case the stat. of 27 H. 8 shall make a fraction of his estate, for he shall have an estate for life, as parcel of his ancient estate, and his son shall have the use and estate executed by the statute of 27 Hen. 8.

And if the feoffees shall never enter but when they shall have their ancient fee-simple, *ex hoc* it would follow, that if a man who hath no son makes a feoffment to the use of himself for life, and after to the use of his 1, 2, 3, 4, &c., sons in tail, and for default of such issue to the use of A. in tail, the remainder over to other persons *in rerum natura*, there all the uses *in esse* limited after the contingent uses are executed by the statute of 27 H. 8. And in such case, if by disseisin or other alteration of the estate before the being of the future uses, the entry of the feoffees should be taken away, because they cannot have their ancient and former fee simple, that would be, as they conceived, inconvenient and dangerous, and that would in effect take away the entry of all feoffees at this day; for, almost in all such conveyances by limitation of uses, some of the later remainders are limited and executed by the statute in persons *in rerum natura*, which cannot be divested by the entry of the feoffees. On the other side, great absurdity and inconvenience will follow, to say the estate remaineth in the feoffees to serve the future use when it shall happen; for suppose a man makes a feoffment to the use of the feoffor for life, and after to the use of his eldest son in tail (he having no son at the time), and after to the use of A. in tail, and after to the use of B. in fee, in this case, if any estate shall be left in the feoffee to serve the future use, he ought to have an estate in fee simple determinable in the mean time, and then the feoffor shall have an estate for life, and the feoffee shall have an estate to him and his heirs as long as he who is not *in esse* (and who peradventure never will) shall have heir of his body, and yet an estate tail shall be vested and executed in A., and the remainder in fee in B., which will be absurd and inconvenient, as before is said. And it will be also inconvenient and dangerous, for then the feoffees should punish waste and enter for the forfeiture, &c., and yet peradventure the future use will never happen; and therefore they conceived that all the uses *in esse* were presently executed, and no estate should

(z) Siderf. 26; Raym. 229, O; Ben. 69; March. 50; 1 Leon. 195; Winch. 60, 61; 1 Mod. 98, 160, 237; 1 Vent. 372, 277.

be left in the feoffee in the mean time till the future use come in *esse*. But they conceived a possibility of entry should remain in the feoffee, which the Ld. Dyer, in 17 Eliz., Dyer, 340 b, termeth (a) *scintilla juris*; for if the feoffor hath issue a son, then presently, by the operation of the act of 27 H. 8, the feoffees should have an estate to preserve this use, for the statute saith, that the estate, &c., that was in such person or persons that were, or hereafter should be, seised of any lands to the use of any person or persons, shall be deemed or adjudged in him or them that have, or hereafter shall have, such use; so that when the son is born, or when the future use cometh in *esse*, they say that the statute giveth the estate from the feoffee to *cestuy que use*, and therefore, by necessity of reason, the estate, after the contingent use cometh in *esse*, shall be in the feoffee to preserve this future use, which by force of the statute might be deemed and adjudged out of the feoffee to *cestuy que use*; but the feoffees in the case before put have but a possibility, because if the future use do not come in *esse* during the particular estate, then it shall never take effect; for, inasmuch as it is in the nature of (b) a remainder, it ought to take effect and vest during the particular estate, or at least at the time of the determination of the particular estate. And it was said, at the bar by the counsel of the defendant, that this seems to be the better opinion.

And it was said that no uses shall be executed by the statute of 27 H. 8, which are limited against the rules of the common law, and the reason thereof is manifest; for it appears by the preamble of the statute 27 H. 8, that it was the intent of the makers of the act to restore the ancient common law of the land, and to extirpate and extinguish such subtle practised feoffments, fines, recoveries, abuses and errors, tending to the subversion of the good and ancient common laws of the land; so that it fully appears that this act of 27 H. 8, shall not execute any use which is limited against the rule of the common law, for the intent of the act was to extinguish and extirpate not the feoffment, fine or recovery, for these were laudable and good conveyances of lands and tenements by the common law, as is in effect recited in the beginning of the preamble; but such uses which are abuses and errors, and therefore erroneous because they are against the rule of the common law, and therefore this law of 27 H. 8, is a law of restitution, *scil.* to restore

(a) Dyer, 340, pl. 49; 1 Co. 132 b; 2 Siderf. 99, 129; Poph. 73; 2 Roll. 337; 1 And. 316, 325.

(b) 1 Co. 66 b; Plow. 29 a, b, 25 b; 2 Co. 51 a; 3 Co. 21 a; Raym. 54; 2 And. 37.

the good ancient common law which was in a manner subverted by abusive and erroneous uses. And therefore if a man at this day makes a feoffment in fee to the use of A. for (c) years, and after to the use of the right heirs of B. or to the use of the wife of B. who shall be; this limitation to the right heirs and to the wife is void, because it had been void if it had been limited in possession, *ut patet* M. 2 & 3 Eliz. Dy. (d) 190, 191. So in the same case if the use be limited to A. for life, and after to the use of the right heirs of B., or to the (e) wife of B. who shall be, if A. dies and after B. dies, or takes wife, this remainder limited to the right heirs or to the wife of B. is void, for it would be void if it had been limited in possession. And the statute of 27 H. 8, intended to restore the good and ancient common law, and not to give more privilege to the execution of uses than to estates, which are executed by the ancient common law. And in proof thereof it was resolved by all the Justices of England, Pasch. 35 Eliz., in the case of the Earl of (f) Bedford referred to them out of the Court of Wards, and was thus in effect, Francis Earl of Bedford made a feoffment in fee of divers manors to the use of himself for years, and after to the use of John Lord Russell, his son and heir apparent, and to the heirs males of his body begotten, and for want of such issue to the use of the right heirs of the said Earl; and afterwards the said John Lord Russell died without issue male in the life of the said Earl; and it was resolved, that the use and estate limited by way of remainder to the right heirs of the Earl was void, for it had been void, if it had been limited by estate executed at the common law, for the (g) remainder ought to vest during the particular estate.

And if a man makes a feoffment in fee to the use of himself for life, and after to the use of his eldest son and his heirs male of his body, and for want of such issue to the use of his second son in tail, &c., provided that if his eldest son (h) attempt to suffer a recovery, or levy a fine, &c., that then his estate shall cease, as if he had been naturally dead, and not otherwise, and that then the land shall descend or remain, as if he had been naturally dead, without any forfeiture; the eldest son hath issue a son, and attempts to alien, in this case the proviso is repugnant and void, for if it had been limited by conveyance at the common law in possession without doubt it had been void: and in

(c) Mo. 488.

(d) 1 Co. 134 b.

(e) Raym. 47.

(f) Mo. 371, 718; Jenk. Cent. 248; Poph. 3, 82; 2 And. 197; 2 Co. 91 b; 2

Roll. 418, 791; Skin. 351; Raym. 83.

(g) Plow. 29 a, b, 25 b; 1 Co. 66 b; 2 Co. 51 a; 3 Co. 21 a; Raym. 54, 413; 2 And. 37; Perk. 12; 1 Co. 134 b; Poph. 82.

(h) 1 Co. 83 b, 84 a; 6 Co. 42 a.

such case, if it should be good, I demand in whom the estate tail shall be after such attempt, and who shall have the writ of waste, and shall enter for the forfeiture, during the natural life of tenant in tail? And if a man by deed with livery of seisin gives land in tail, the remainder in tail, the remainder in fee: provided always (as above), such proviso is repugnant and void, as is directly proved by (i) *Richel's Case*, in Litt. 163, and by (j) 21 Hen. 7, 11, and (k) 21 Hen. 6, 33 b. And this case of an use is not to be resembled to a rent (l) newly created, or any other thing out of the land, but only to land itself, for now the stat. hath with an indissoluble marriage united the land and use together, and it will be consonant to the intent of the makers of the act of 27 H. 8, to restore the ancient common law in the construction of the execution of the possession to the use. Then it will be objected, that inasmuch as the stat. in the mean time executes all the uses in *esse*, and *cestuy que use* is *quodam modo* in the *post*, and not *in* in the privity of the estate out of which the future use rises, that for this reason the future use shall not rise at all, which will be mischievous and inconvenient.

The answer to this objection will be plainer if a case be put of an use in *esse* and in *futuro*, and upon that the manner how future uses shall be vested by the stat. of 27 H. 8, will be shown, as by way of demonstration. A. makes a feoffment in fee to the use of himself for life, and after to the use of him who shall be his first son in tail, and for default of such issue to the use of B. in tail, and for default of such issue to the use of C. in fee; in this case immediately by the feoffment A. hath an estate for life, the remainder to B. in tail, the remainder to C. in fee, and no estate is put in abeyance or left in the feoffees; but if after A. hath issue a son then the possibility which the feoffee had becomes an estate in law, and the statute immediately executes the possession according to the limitation of the use; but if tenant for life be disseised before the birth of the son, and after he hath issue a son, now nothing vests in the son because there ought to be an use in *esse* before the statute can execute the possession; but who shall enter to remove the impediment, and to restore the privity of the estates? Certainly if the tenant for life re-enters he shall revive all the former

(i) Litt. sect. 720; Co. Litt. 377 b; 1 Co. 88 a; 2 And. 135, 138; 1 Roll. Rep. 485; 1 Co. 131 b.

(j) Br. "Condition," 83.

(k) Fitz. "Condition," 4; Br. "Con-

dition," 57.

(l) Perk. sect. 327; Plowd. 156 a; 10 H. 7, 13; 5 E. 2, "Dower," 143; 12 E. 3, "Condition," 11; 22 E. 3, 19 a; 4 Leon. 83; 6 Co. 41 a; 8 Co. 17 b; 1 Co. 87 a.

estates which the statute of 27 Hen. 8, hath executed to the former uses in *esse*, and therefore also the statute doth transfer the estate of the land to the son in tail, for that is the privity which the statute requireth, scil. privity of estates which the same statute hath executed upon the limitation of the uses in the same conveyance before, and after the death of tenant for life the feoffees may enter and revive the use. And as lessee for years or for life, upon condition to have fee, cannot have an (m) increase and enlargement of his estate, but upon the privity of estate of the lessee; so no remainder of a future use can be transferred into an estate by force of this act, before the particular estates executed by the statute upon the limitation of the uses in the same conveyance are recontinued. But if tenant for life makes a feoffment in fee, or dies before the birth of the son, his remainder is destroyed. As (n), if a lease be made for life the remainder to the right heirs of J. S., if the lessee for life makes a feoffment, or dies during the life of J. S., the remainder to the right heirs is destroyed; and that, as it seems, is the best construction of the stat. of 27 H. 8; for other construction would overthrow the estates of an infinite number of persons, which would be inconvenient and against the practice and common opinion ever since the making of the said act to this day.

Another objection hath been made that an use in contingency is in the custody of the law, and therefore cannot be discontinued or taken away; but from thence will follow great absurdities. 1st. It would be absurd that a future or contingent use might be discontinued or taken away by feoffment *bonâ fide* upon notice or disseisin, &c. before the stat. and shall not be thereby taken away or discontinued after the stat., when the stat. doth not extend to it until it comes in *esse*. 2ndly. It would be absurd that the law, which by its definition is *sanctio sancta, jubens honesta et prohibens contraria*, should be the conservator or preserver of a thing impious and fraudulent; for, by the judgment of the whole parliament of 27 H. 8 (o), uses are subtle and crafty, invented by fraud to disinherit heirs, to defraud the king and all other lords of their escheats, wards and other profits of their seigniories, to deceive purchasers, &c.; and as it is in the preamble to introduce many other inconveniences, and to raise trouble and inquietness between the subjects, will this be *jubere honesta et prohibere contraria*? No truly, but will be *jubere iniqua et prohibere con-*

(m) 8 Co. 75 a.

(n) 1 Co. 135 b.

(o) 1 Co. 121 b.

traria; and therefore Fitzh., in *Bokenham's Case*, 28 H. 8, Dy. 12, saith truly, that uses are odious in the law. 3rdly. The common law will not keep and nourish these subtle and fraudulent uses, *tanquam in gremio legis*, because, as appears by the judgment of all the parliament, in 27 H. 8, they were invented and practised in subversion of the ancient common law; but the law will not preserve a subverter and destroyer in its bosom; and these uses are termed abuses and errors by the whole parliament in 27 H. 8, and therefore cannot remain *in gremio legis*. So the intent of the parliament was to extirpate and extinguish subtle and fraudulent uses as things tending to the subversion of the ancient common law, and as authors of frauds, subtilty, deceit, trouble, inquietness, errors and abuses, besides many and great mischiefs and inconveniences; and the letter also of the purview of the act was clearly against them, and therefore it would be against all reason to make a construction against the express intent and meaning of the act of parliament, but herein to imitate the example of the reverend judges in times past, who always construed all acts made against the fraud of uses (for of those only it was spoken) (*p*), liberally and by equity against the letter for suppressing the fraud and inconveniences of uses, and therefore where the statutes of (*q*) 1 R. 2 & (*r*) 4 H. 4, aforesaid, gave an action to [against] *cestuy que use* (calling him pernor of the profits) and that the writ should not abate for non-tenure, yet the Judges, M. (*s*) 4 E. 4, 38 b, by equity to meet with the fraud of uses, did extend it to joint-tenancy as it is there held, and also in (*t*) 5 E. 4, 44 b & 45 & (*u*) 7 H. 6, 10 a, and the Judges in (*x*) 36 H. 6, 34 a, b, extend the said stat. by like equity to disclaimer. Also, the stat. of 1 H. 7, c. 1, gave a formedon only by express name against *cest' que use*, but the Judges, Mich. (*y*) 14 H. 7, 17, 31 & (*z*) 15 H. 7, 8, upon long debate, extended it to a *scire facias* to execute an estate tail in remainder by equity; so the stat. of 1 R. 3, c. 1, which speaks of leases, &c. made by *cestuy que use*, is extended by the Judges in (*a*) 7 H. 7, 6 a, b, to executions by *elegit*, &c., by *cestuy que use*; and where the stat. of 1 R. 3, saith, all grants, &c.

(*p*) 3 Co. 82 a.

(*q*) 1 R. 2, c. 9; Dyer, 295, pl. 11; 1 Co. 123 a.

(*r*) 4 H. 4, c. 7.

(*s*) 5 Co. 77 b; Fitz. "Maintenance de Brief," 35; Br. "Pernor de Profits," 25.

(*t*) Long. Quinto, E. 45 a; Br. "Pernor de Profits," &c., 20.

(*u*) Br. "Pernor de Profits," &c., 34;

Fitz. "Maintenance de Brief," 9.

(*x*) Fitz. "Maint. de Brief," 29; Br. "Pernor de Profits," 14.

(*y*) Br. "Pernor de Profits," 10.

(*z*) "Maint. de Brief," 60; Plowd. 59 b, 178 a; Br. "Pernor de Profits," 10.

(*a*) Br. "Feoffment al Use," 25; Fitz. "Execution," 19; Br. "Execution," 90; Br. "Recogniz." 13, in fine.

shall be good against him and his feoffees, yet it was agreed, 4 H. 7, 8 b, that the grant of a rentcharge should be good against the disfeisor of the feoffees. And if *cestuy que use* be enfeoffed by the disfeisor of the feoffees, and he makes a feoffment over, if the letter of the act of 1 R. 3 be only considered, that is not according to his authority, given by the precise words of the said act, for it is said in 8 H. 7, fol. 9 a, that he ought to do it as servant and in the right of the feoffees; and yet (b), 27 H. 8, 29 b, it is good to a purchaser by the equity of the stat., for as it is said in (c) 5 H. 7, 5 b, the same act was made for the advantage of the grantees and not for the advantage of *cestuy que use*. But in the case at bar the meaning of the makers of the act is apparent and the letter of the act is expressly with us, and greater mischiefs otherwise would follow than were before the act, if these future uses should be preserved in the case at the bar. The stat. made, 13 E. 1, *De donis conditionalibus*, in a manner created perpetuities, and it continued about 200 years; but in (d) 12 E. 4, 19, by the resolution of the Judges it was resolved, that by a common recovery the estate tail should be barred, for the mischiefs which were introduced in the commonwealth thereby. In the time of R. 2, Just. (e) Richel attempted to make a perpetuity as it appears by Litt. in his chapter of Warranty, fol. 263 and 21 H. 6, 33 b, which was such in effect, Just. Richel having divers sons and intending that none of his sons should alien those lands, or make a warranty to bar or hurt the others, made a deed indented to such effect, *scil.* that the lands and tenements were given to his eldest son in tail upon condition, that if his eldest son should alien, in fee or in tail, &c., or if any of his sons should alien, &c., that then their estate should cease and be void, and that then the lands should remain to his second son in tail, &c., and *sic ultra*, the remainder to his other sons, and livery and seisin was made accordingly. But all such remainders were void because the limitations of them were against the rule of the law, as appears there by Litt. And it appears in 21 H. 6, 33, that Thirning, Chief Justice of the Com. Pleas, made the like perpetuity for the continuance of his land in his blood without alienation; but the Judges held that it was against the law. And if after the stat. of 27 H. 8, which hath made an inseparable unity and conjunction between the use and the possession, the like construction

(b) Br. "Feoffment al Use," 8.

Goldsb. 308; Hardr. 209.

(c) Br. "Feoffment al Use," 23.

(e) 2 And. 135, 138; Litt. sect. 720; Co.

(d) Co. Litt. 361 b; Pigot, cap. 1; 6 Co. 40 b; 10 Co. 37 b; 1 Bulst. 159, 160;

Litt. 377 b; 1 Roll. Rep. 485; 1 Co. 88 a, 130 a; 6 Co. 42 b.

shall be made of estates limited in use and executed by the stat. as of estates executed in possession and by the common law, it will be hard, in my opinion, to maintain such provisoes or conditions to make estates of freehold and inheritance lawfully vested to cease in one, and to vest and revest in others, against the rule of the common law. And so I conceive upon the whole matter, that the future uses in the case at the bar by the said feoffment of the feoffees were utterly destroyed, and, by consequence, judgment ought to be given for the defendant.

And afterwards this case was openly argued by all the Justices of England and the barons of the Exchequer, in the Exchequer Chamber, at six several days: 1. By Baron Ewens and Justice Owen; 2. By Just. Beamond and Justice Fenner; 3. By Just. Walmesley and Just. Gawdy; 4. By Baron Clark and Justice Clench; 5. By Sir W. Periam, Chief Baron of the Exchequer, and by Sir Ed. Anderson Ch. Just. of the Com. Pleas; and 6. By Sir J. Popham, Ch. Just. of Engl. All which arguments of the judges and barons I heard, except only that of Just. Beamond, and therefore what I shall say of that, I shall say by credible relation of others; but my intent is not to report any of their arguments at large, and in the same form as they were delivered by them, but to make such a summary collection of the effect and substance of them all, as the matter (it being the first case which was adjudged, and being of great importance) will permit.

And because Just. Walmesley and the Chief Baron only argued that judgment should be given for the plaintiff, and all the other judges and barons concluded against the plaintiff, I begin with the effect of their two arguments; viz.—

Before the stat. of 1 R. 3, the feoffees had not only the whole estate in the land, but also the whole power to give and dispose of it; for *cest' que use* was a trespasser, if he entered upon the land against their will. And after the stat. of 1 R. 3, *cest' que use* had power to make a disposition of the land itself; and yet notwithstanding that, the whole estate of the land did remain in the feoffee until *cest' que use* had made such a disposition, for which reason the said act intending to provide for *cest' que use* had not made a sufficient provision for him. For the estate of the land remaining in the feoffees, they many times contrary to the trust reposed in them, by secret feoffments, estates and other covinous acts had defrauded *cest' que use*, and had prevented such disposition of the land which the said act of 1 R. 3, gave him; and as Walmesley said, there was sometimes fraud in both, for when *cest' que use* by him-

self without the feoffees, by force of the stat. of 1 R. 3, and the feoffees by themselves without *cest' que use*, by the common law, had both severally absolute power to make disposition of one and the same land; sometimes *cestuy que use* by his secret estates prevented the feoffees, and sometimes the feoffees by the like secret estates prevented *cestuy que use*, so that as he said, they played at double hand, and thereby frustrated the true intent of the act. And the Chief Baron and Walmesley said, that the stat. of 27 H. 8 was not made to extinguish or eradicate any uses, but the stat. of 27 H. 8 hath advanced uses, and hath now established safety and assurance for *cestuy que use* against his feoffees; for before the stat. the feoffees were owners of the land, and now the stat. hath made *cestuy que use* owner of the land; before the stat. the possession governed and ruled the use, but now since the stat. the use governs and rules the possession; for by the said act of 27 H. 8, the possession is a subject and follower of the use. And no word in the preamble doth condemn uses, but for the extirpating and extinguishing of all such subtle practised feoffments, fines, recoveries, abuses, &c.; so that the uses are not guilty of the inconveniences mentioned in the preamble, but the feoffments, fines and recoveries, subtilly and craftily practised, so that the intent of the act was to extirpate and extinguish (which are both significant words) all such feoffments, fines and recoveries; but how? by destroying of uses? no truly, but by divesting the whole estate out of the feoffees, conusees and recoverors, and vesting it in *cestuy que use*, so that it would be against the meaning and the letter of the law also, to say that any estate or right, or *scintilla juris* should remain in the feoffees after the stat. of 27 H. 8; for it appears by the preamble, that the makers of the act intended to extirpate and eradicate the whole estate of the feoffees; and the letter of the body of the act is, that the estate, right, title and possession that was in such person or persons that were or hereafter shall be seised of any lands to the use of such person be from thenceforth clearly adjudged and deemed in him or them, &c., so that by a judgment given by the whole parliament the estate shall be out of the feoffees (*f*); and the Chief Baron said, that *scintilla juris*, which is mentioned in 17 El. is like Sir Thomas Moore's Eutopia; and they said, that since this stat. no trust or confidence was reposed in the feoffees.

(*f*) Dyer, 340, pl. 49; 1 Co. 129 b; 2 Sid. 99, 129; Poph. 73; 2 Roll. Rep. 337; 1 And. 315, 328.

For now, as Walmesley said, the feoffees *non possunt agere aut permittere aliquid* in prejudice of *cestuy que use*.

Before the stat. the office of the feoffee was to execute the estate according to the use, but now the stat. hath taken away all the office of the feoffees, and now the act executes the possession to the use, and takes away all the trust and power out of the feoffees. And the letter of the stat. of 27 H. 8 is, "where any person or persons stand or be seised, or at any time hereafter shall happen to be seised;" and they relied much upon these words (at any time), for it seemed to them by these words that the seisin, which the feoffees had at the beginning by the feoffment, would be sufficient, within this act, to serve all the uses, as well future, when they come in *esse*, as present, for there need not many seisins, nor a continued seisin, but a seisin at any time; so a seisin at one time would suffice, for the stat. saith, seised at any time; and it would be hard when the stat. requires but one seisin at one time only, that many seisins, and at several times, against the intent and letter of the act, should be required. The stat. of 27 H. 8 extends to all lawful and good uses, as well future as in *esse*, and no such use is destroyed but advanced and extolled, as hath been said before. And Walmesley said, that if such construction should be made to destroy these future uses, the usual pleading in practice ever since the statute ought to be altered, for the pleading of a feoffment in fee to future uses after that they come in *esse*, is (*g*) *virtute cujus et vigore actus parliamenti, &c., de usibus in possessionem transferend' cestuy que use*, was seised, &c., so that one seisin is sufficient, as is proved by the usual form of pleading; but now the pleading of it must be altered, if many seisins should be requisite, and then more seisins than one ought to be alleged. And he said, as a fountain gives to every one which comes in his turn to it his just measure of water, so the first seisin and estate in fee, given by the first feoffment to the feoffees, is sufficient to yield to all persons to whom any use, present or future, is limited, a competent measure of estate in their time, proportionable to their estates which they shall have in the use; so that it seemed to them that the first seisin by force of the feoffment by which the fee simple is given to the feoffees would be sufficient to serve all the particular uses, as well future as present, in their several times, and nothing should remain in the feoffees. But Walmesley said, that the whole

estate shall be first vested in those who are *in rerum natura*, and the possession shall be vested in him who hath the future use, when it comes in *esse* by force of the first livery, and shall divide the estates which were conjoined before. And he agreed that an alien (*h*), or a person attainted, or a corporation, could not at this day be originally enfeoffed to the use of another, for no use can be created out of their seisin. J. S. makes a feoffment in fee to divers natural persons to certain uses, some present and some future, so that the uses are well created and raised; although a corporation be afterwards enfeoffed of the land, yet the future uses, when they come in *esse*, shall be raised and executed by force of the first livery, and the first seisin of the feoffees, and by force of the act, as he conceived. And Walmesley further said, that the future uses in our case cannot be suspended, for a thing which never was in *esse* cannot be suspended, but the whole estate vests first in them who have the present uses, or the uses in *esse*, and when the future uses come in *esse*, then they shall come in between the other estates which were conjoined before; and in proof thereof they cited the case of (*i*) *Cranmer*, in 14 El., reported by the Lord Dy., fo. 309, and the case (*k*) *de seniori puero*, in 16 El., reported also by the Lord Dy., fo. 337, and the case in (*l*) 5 H. 7, 6 a. If *cestuy que use*, by force of the stat. of 1 R. 3, makes a feoffment in fee upon condition, and after enters for the condition broken, the feoffees should never have the land again, because all the interest and privity of the feoffees was once by the feoffment taken out of them: so the case in 19 H. 6, fo. 76, and 2 E. 4, 2, if a man makes a feoffment in fee upon condition that he shall make a feoffment over in fee, in that case, if the second feoffee refuses, the feoffor shall enter, for it was the intent of both parties that the feoffee should depart with his whole estate, and nothing should remain in him; otherwise it is, if the condition was that he should make a gift in tail; and he said, if a feoffment be made of land to the use of A., and there is also a rent issuing out of the same land to the use of B., although the possession of the land be disturbed by disseisin, yet the use of the rent is not disturbed thereby, because the disturbance is done to another seisin, that is to say, to the land, and

(*h*) 1 Co. 122 a.

(*i*) O. Ben. 43, 69; Yelv. 9; Mo. 110; 2 Leon. 5; 3 Leon. 20; 1 And. 19, 196, 316; 2 And. 37; Dyer, 309, 310; Wentw. 118, 119; Litt. Rep. 289; Poph. 82; Goldsb. 20; 1 Co. 66 b.

(*k*) Dav. 35 a; Dyer, 133, pl. 5; Mo. 103, 104; 2 Leon. 216, 217; 3 Leon. 158; Styl. 293; Ow. 64; 1 And. 40, 316; O. Ben. 29; 2 Roll. 789; Litt. Rep. 321.

(*l*) Perk. sect. 842; Br. "Condition," 225.

not to the seisin of the rent out of which the use is limited. So in the case at bar, the disturbance is not to the first seisin given by the feoffment, out of which all the uses, as out of a fountain, flow, but the disturbance is done to other seisins, *scil.* to seisins executed by the stat. of 27 H. 8, and not to the first seisin, which by no means can be tolled or devested, for it hath not any essence until the future use hath essence, which by force of the stat. shall draw a sufficient estate to it; but when the future use is come in *esse*, now by reference and relation to the first seisin, there is seisin and use within the stat. of 27 H. 8. And in proof thereof he cited (m) *Bracebridge's Case*, 15 El., which in effect was, a man made a feoffment of a manor to several persons, to certain uses, upon condition that if certain money was not paid within a certain time, that then they should stand seised to other uses; the money was not paid, and after attornment was had to the feoffees, when the possession of the demesne was executed before by the statute; in that case, after the condition broken, *cestuy que use* had possession of the land by force of the first livery; and yet there was not any continuance of seisin in the feoffees, neither were the feoffees seised of the land at the time of the execution of the possession to the use.

And the case of 13 El. (n), Dy. fo. 298 b, 22(o) El. 369 a, tenant *in capite* enfeoffs one and his heirs, provided that when the feoffor shall pay 100*l.* to him or his heirs, that then it shall be to the use of the feoffor and his heirs; the feoffee dies, his heir within age, the 100*l.* is paid, office is found, the feoffor shall have the use by force of the first livery, and, by relation to that, shall defeat the wardship of the body and land. And he said, if a man makes a feoffment in fee to the use of himself for life, and after to the use of another in tail, with divers remainders over, with power to the lessee for life to make leases for twenty-one years or three lives, in that case, if the tenant for life makes a lease for twenty-one years or three lives, it ought to be derived and take its essence out of the first feoffment, or otherwise all leases would be determined by the death of the lessee for life; and in the same case there is not any seisin continuing in the feoffees, but the first seisin is sufficient, and this is consonant to the words of the act of 27 H. 8, for it saith, that the estate that was in the feoffee shall be adjudged in *cest' que use*; but Periam, Chief Baron, conceived, that

(m) 1 And. 113, 316; 4 Leon. 5; Plowd. 417 b; Mo. 99, 612; B. N. C. 423.

(n) Dyer, 298, pl. 30; 1 Keb. 800; 2

Keb. 145; Co. Litt. 76 b, 248 a; 2 Roll. 39; 2 Roll. Rep. 469; 10 Co. 85 a.

(o) Dyer, 369, pl. 51.

these future uses, before their births are not preserved in the bowels and belly of the land, but that they were *in nubibus*, and in the preservation of the law; for he well agreed with Walmesley, that by force of the act the whole estate shall be out of the feoffees, and then of necessity he said it ought to be in some person, or in abeyance and consideration of the law.* And it would be absurd to say that the feoffees should have a less estate than they took by the first livery. And, therefore, because nothing remains in the feoffees, and this future use cannot be executed until the person who should take it comes in *esse*, it must of necessity be in the mean time in the preservation of the law. And if any case be doubtful upon a statute, it is good to construe it according to the reason of the common law, as it is said in *Dalmeré's Case*, in Plow. Com. 351.

And if the estate in our case had been limited in possession by livery and seisin, the remainder to the eldest son, &c. till his birth, it would be by the rule of the common law in the consideration of the law; and by the same reason the use shall be in our case; and as the use shall be so shall be the possession by force of the stat., for be the use in *esse*, or in the consideration of the law, the possession shall be transferred to it by force of the stat. And he took a difference between feoffees before the stat. and feoffees since the stat.; for if feoffees to an use were disseised before the stat. no use could be executed after the stat. without re-entry of the feoffees, for the stat. saith, which be or at any time hereafter shall be seised, &c. And those who were disseised before the stat. were not seised at the time of the act, nor at any time after until re-entry, otherwise it is when the feoffment is made after the stat. *causa qua supra*. And where the stat. saith, to the use of any person or persons, the stat. doth not say to the use of any person or persons in *esse*, but to the use of another person, and that shall be intended when his time shall come; and it would be a hard construction to destroy these future uses in our case, which were limited upon good cause and consideration, and especially when the sons, who then were not in *esse*, were not parties to any wrong, covin or practice; but he said, that the use by the common law was in abeyance and custody of the law. And the possession accordingly by force of the stat. for no other person can take it, and a thing which is committed to the custody of the law, the law will lawfully preserve without any violence or destruction. And therefore (p), 32 H. 6, if there be tenant for life the

(p) 1 Co. 67 a; 1 Co. 135 b; 6 Co. 42.

remainder to the right heirs of J. S. and tenant for life is disseised, and a descent cast, and after J. S. dies, and then the lessee for life dies, the entry of the right heir of J. S. is lawful, and he puts also the case of the parson as to this purpose. And to prove that as well the possession as the use are in the custody of the law he cited (*g*) *Cranmer's Case*, 14 El., Dyer, 309, that the remainder limited to the executors was in abeyance, and the *Earl of Bedford's Case* (*r*), in which case he said it was agreed that the remainder to his right heirs was in the custody of the law until the death of John Lord Russell. And 17 El., Dyer (*s*), *Brent's Case*, fol. 340, that the remainder limited to the wife that shall be was in abeyance, and the *L. (t) Bray's Case*, 2 El., Dyer, fol. 190, 191, where it was held, that the remainder limited to the wife that shall be should be in abeyance, if the particular estate had been but a term, which cannot by the rule of law support a remainder in abeyance. And he cited the cases in Brook's Abridgm. tit. *Feoffments al Uses*, 30 H. 8, pl. 50, 3, M. pl. 59, when Brook was Chief Justice, and he said, that these uses have extended themselves into many branches, and are to be resembled to Nebuchadnezzar's tree; for in this tree the fowls of the air build their nests, and the nobles of this realm erect and establish their houses, and under this tree lie *infinita pecora campi*, and great part of the copyholders and farmers of the land for shelter and safety; and he said, if this tree should be felled or subverted it would make a great print and impression in the land. And therefore it was convenient to repress the mischief after by parliament, and not to have any retrospect to cases before.

And he and Walmesley also agreed in their argument, that the uses in this case should follow the rules of estates at the common law. And therefore in this case if tenant for life dies before the birth of the son, the remainder in use shall be void, for such remainder would be void by the rule of the common law, if it had been made in possession, if the (*u*) remainder do not vest during the particular estate, or at least when the particular estate determines, and no difference between uses

(*g*) O. Ben. 43, 69; Yelv. 9; Mo. 100; 2 Leon. 5; 3 Leon. 20; 1 And. 19, 196, 317; 2 And. 37; Dyer, 309, 310; Wentw. 118, 119; Goldsb. 20; Litt. Rep. 289; Poph. 82; 1 Co. 66 b, 133 b.

(*r*) Mo. 371, 718, 719; Poph. 3, 82; Jenk. Cent. 248; 2 And. 197; 2 Co. 91 b; 2 Roll. 418, 791; Raym. 83.

(*s*) Co. 136 a; 1 And. 316; 2 And. 198;

Poph. 73, 76; 1 Co. 101 a, 128 a; Litt. Rep. 290, 321; 2 Leon. 14.

(*t*) 1 And. 5; 2 Roll. Rep. 101; 1 Co. 130 a, 135 b.

(*u*) Plowd. 25 b, 29 a, b, 35 a; 1 Co. 129 b, 130 a; 2 Co. 51 a; 3 Co. 21 a; Raym. 54, 413; 2 And. 37; Mo. 104; Perk. 12; Palm. 139; Poph. 82.

and estates made in possession as to this purpose. And so they concluded that judgment ought to be given for the plaintiff.

And on the other side it was argued by Baron Ewens, Justice Owen, Justice Beamond, Justice Fenner, Justice Gawdy, Baron Clark, Justice Clench, the Lord Anderson, and Popham, Lord Chief Justice, to the contrary. And it was agreed by them all that the (x) feoffment made by the said feoffees who had an estate for life by limitation of the use divested all the estates and the future uses also. And although Richard Chudleigh, their feoffee, had notice of the first use, yet it is not material, because all the ancient estates were divested by the said feoffment; and this new estate cannot be subject to the ancient uses which rise out of the ancient estate which was divested by the feoffment. And Gawdy, Justice, conceived that the uses limited to the eldest son, &c. were in abeyance, and he said that the estates of the land sufficient to serve these future uses were in abeyance also; but he agreed it was not by the letter of the stat. of 27 H. 8, but should be taken by equity of the said stat. For he said, the letter of the stat. is, to the use of any person or persons, and here wanteth person; also in every case such person shall be adjudged in lawful seisin, &c.; also that the estate, &c. shall be adjudged in him or them that shall have such use; and therefore he said the uses in abeyance by the equity of the stat. did draw sufficient estate to serve them in abeyance also, and that for the saving and maintenance of future uses, and that they should not be defeated or destroyed; and he agreed also, that all the present uses, as well precedent as subsequent, were executed immediately; and he agreed with the other Justices, that the stat. of 27 H. 8, did not extend to subvert and destroy uses in other manner than by the executing and transferring of the possession of the land to them. And Gawdy cited the opinion of Fitzh. in 28 H. 8, fol. 12 a, that it was an inconvenience and impossibility in the law before the stat. of 27 H. 8, that two men should have several powers to make a disposition of the same land, *scil.* the feoffees by the common law, and *cest' que use* by the stat. of 1 R. 3, and that inconvenience was intended to be remedied by this act of 27 H. 8, and he conceived that the whole estate should be out of the feoffees, for no right of the feoffees is saved which they have to another use, as it is said 7 E. 6, in *Stephen Daves's Case* (y), Dyer, fol. 88 b.

(x) Cro. Car. 102; Cro. El. 630; Mo. 339, 546; 2 Roll. 794; 2 Roll. Rep. 216.

(y) 1 Co. 126 a.

And if a feoffment in fee be made to the use of one for life, and after to the use of the right heirs of J. S., the fee simple of the land shall be in abeyance; and before the stat. if a man had made a feoffment to the use of one for years, and after to the use of the right heirs of J. S., this limitation had been good, for the feoffees remain tenants of the freehold; but such limitation after the stat. is void, for then the freehold would be in suspense, for nothing can remain in the feoffees; but he said that these remainders in future were divested and destroyed by the feoffment of the tenants for life (*z*); and although the remainders be in custody of the law, yet they ought to be subject to the rules of the law, for the law will never preserve anything against the rule of law: and because the rule of law is, that he in the (*a*) remainder must take the land when the particular estate determines, or else the remainder shall be void; and in this case, forasmuch as by the feoffment of the tenant for life their estate was determined and title of entry given for the forfeiture, and then those in the future remainder were not in *esse* to take it, for this reason these remainders *in futuro* by this matter, *ex post facto* were utterly destroyed and made void, and there is no difference when the estate of the tenant for life determines by the death of the tenant for life, and when it determines in right by his forfeiture; for in both cases entry is given to him in the next remainder, and then if he cannot take the land when the particular estate determines the (*b*) remainder is void. And if Strachley Chudleigh at the time of the forfeiture had been born, he might have entered for the forfeiture.

If there be (*c*) tenant for life, the remainder to the right heirs of J. S. if in that case tenant for life makes a feoffment in fee during the life of J. S. the remainder is destroyed, for otherwise there would be a remainder without a particular estate which cannot be, no more in the case of an use than in the case of an estate made in possession. And upon that he cited the case 3 El. (*d*), *Bray's Case*. And of the same opinion was Popham, Chief Justice, Baron Clark and Owen, as to the said point of forfeiture, admitting that no disturbance or alteration of the estate had been made. And the Ch. Just. denied the opinion

(*z*) 2 Roll. Rep. 216.

(*a*) 1 Co. 66 b; Poph. 82; Palm. 139; Raym. 54, 413; Plow. 25 b, 29 a, b, 35 a; 1 Co. 130 a, 129 b; 2 Co. 51 a; 3 Co. 21 a; 2 And. 37; Mo. 104; Perk. 12.

(*b*) Plow. 25 b, 29 a, b, 35 a; 1 Co. 66 b,

129 b, 130 a; 2 Co. 51 a; 3 Co. 21 a; Raym. 54, 413; 2 And. 37; Mo. 104; Perk. 12; Palm. 139; Poph. 82; Litt. R. 262.

(*c*) 1 Co. 130 b.

(*d*) 1 Co. 130 a, 134 b; 1 And. 5; 2 Roll. Rep. 101.

of Gascoigne in (e) 7 H. 4, 23 b, who thought that such remainder should not be defeated by the feoffment of tenant for life. And Baron Clark put the case in (f) 11 R. 2, Fitz. Detinue, 46. A gift in tail was made to A. C., the remainder to the right heirs of A. S., the donee made a feoffment to B. in fee, and afterwards A. S. died; his right heir shall never have the remainder nor any charter that concerns it, for the estate of the land was by the feoffment of the tenant in tail divested and discontinued, and all estates vested in the feoffee, and there was not any particular estate, neither in *esse* nor in right, to support the remainder, when it should fall, for by the feoffment of the tenant in tail his right was utterly gone, as Littleton says, and then at the time the remainder fell, *scil.* at the time of the death of A. S. there was not any particular estate to support the remainder, neither in *esse* nor in right. And in the same case *nota dictum* by Charleton, Ch. Just. *et judicium*: but if (g) tenant in tail was disseised and died, that will not toll the remainder, for there a right of the particular estate remains to support the right of the remainder, but when the tenant in tail makes a feoffment no right remains in him. And Owen, Justice, said, if tenant for life had made a feoffment in our case before the birth of the son, he in the next (h) remainder in *esse* should enter for the forfeiture. And Gawdy, Justice, said, that in divers cases a thing in abeyance may be barred and destroyed; as, if tenant in tail be disseised, and releases to the disseisor, now (i) Littleton says, the estate tail is in abeyance, yet it may be barred by (k) common recovery in which the tenant in tail is vouched; so, if there be tenant in tail, the remainder to the right heirs of J. S., if tenant in tail suffers a common recovery, the remainder is barred. So he said, upon the case in 17 Eliz. Dyer, fol. 34 (l), if the husband makes a feoffment in fee before the taking wife, the wife shall never take, for the possession and estate of the land is altered, changed and transferred to the possession of another before the title of the wife doth accrue; but if no divesting or alteration had been, then the use shall vest in the wife, and he resembled it to the case 22 (m) Ass. pl. 37, 26 Ass. pl. 8 and 29 (n) Ass. pl. 34. If a warranty be made to the

(e) 1 Co. 66 b.

(f) 1 Co. 67 a; Litt. R. 290; Palm. 238.

(g) 1 Co. 67 a, 134 b.

(h) Litt. R. 262.

(i) Litt. a. 649; Co. Litt. 345 a.

(k) 6 Co. 42 a.

(l) 1 Co. 101 a, 128 a, 134 b; 1 And. 316;

Poph. 73, 76; 2 Leon. 14; 2 And. 198; Lit. Rep. 290, 321.

(m) Co. Litt. 117 a; Br. "Chose in Action," 8; Br. "Garranty," 45; Br. "Villainage," 36; 3 Co. 62 a, 63 a; Br. "Voucher," 182; Hob. 27.

(n) 3 Co. 62 a, 63 a.

possession of a villein, if the ancestor dieth, so long as it continues in his possession it shall bind, but if the lord of the villein enters before the warranty doth (o) attach, then the warranty shall not bind, for the lord of the villein is in by force of his title of villeinage, and the estate and the possession of the land doth not continue, but by the entry of the lord is altered and changed. And it was held by Baron Ewens, Owen, Beamond, Fenner, Clark, Clench, the Lord Anderson and Popham, Lord Chief Justice, that at the common law, by disseisin or by such (p) feoffment as in the case at bar, as well all future uses, or uses in contingency are divested and discontinued, as uses in *esse*, till the first estate out of which the uses rise be recontinued. And the statute of 27 H. 8 doth not transfer any possession to any use but only to uses in *esse*, and not to any use in future or in contingency till they come in *esse*; and this appears by the express letter of the act, for as there ought to be a person in *esse* seised to the use, so there ought to be an use in *esse* which should rise out of the estate, and there ought to be a person in *esse* who should take the use before any possession can be transferred and executed to the use; for if the person who should take the use be not in *esse*, or if the person be in *esse* and no use be in *esse*, but only a possibility (as the Lord Anderson said) of an use, there can be no execution of the possession to the use. And as at the common law there can be no use in *esse*, if there be no seisin out of which such use shall rise; so no use can be executed by the statute of 27 H. 8, unless there be seisin in some person subject to such use at the time of the execution thereof, for the express letter of the act is where any person or persons stand or be seised, or hereafter, &c. shall stand or be seised, &c. to the use of any other person or persons, so that there ought to be a person in *esse* on both parts, *sc.* who shall be seised to the use and who shall take the use, so that it is necessary not only to have an use limited, but a person capable of the use when the statute transfers the possession to it, and therefore if the person fail it is not possible to have the possession executed by this statute to one who is not *in rerum natura*, for the statute says, to the use of any person or persons: in every such case, all and every such person and persons that have any such use in fee simple, fee tail, for term of life or years, or otherwise, or any use in reversion or remainder, &c. (in which words, note the word "such" is iterated three times); so that uses

(o) Co. Litt. 340 b.

(p) 1 Co. 174 b.

in *esse*, that is to say, in possession, reversion or remainder, for there is no word of any possibility or contingency, and persons in *esse* are only within this act) shall from henceforth be deemed and adjudged in lawful seisin, estate and possession, and that cannot be any person who is not in *esse*, or any person who is in *esse*, and who hath but a possibility of an use, who perhaps will never have an use in *esse*. And by these words it fully appears, that no estate by this statute can be transferred to the possibility of an use. And that the estate that was in such person or persons that were or hereafter shall be seised to the use of any such person or persons be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have such use: so that this clause doth not divest any estate out of the feoffees, but when it can be executed in the *cestuy que use*, (that is to say) in him or them that have or hereafter shall have such use, which one cannot have who is not in *esse*; for he is not a person who can have an use, and by consequence cannot have any possession by this act.

And it was further held by the two Chief Justices, and Clench, Clark, Beaumont, Owen and Ewens, that those who had argued on the other side had taken but the first part of the sentence, that is to say, "that the estate shall be out of the feoffees," but they had forgot the latter part of the sentence, *scil.* "that the estate shall be in such person who hath the use," and that cannot be till the person and the use also be in *esse*. And by this clause it also appears, that no estate of the feoffees shall be transferred in abeyance out of the feoffees, and vested in nobody, or be transferred to a possibility of an use which hath not any being, for then an estate in *esse* would be transferred to the possibility of an use which hath not any being; which would be against reason, and against the letter and meaning of the act; for the words are, "and shall be adjudged in him or them that shall have such use;" *ergo*, the estate of the feoffees shall not be in abeyance. And the two Chief Justices, and Fenner, Beaumont, Owen and Ewens said, that if the estate should be utterly out of the feoffees, and all vested in those who have the present uses (as some have held before), then the future use would never rise; for it is not possible that it should be raised out of the possession of *cest' que (q) use*, for an use cannot be raised out of an use, as is 36 H. 8, tit. Feoffm. al Uses (r), Br. 54, 5 Mar. (s), Dyer,

(q) 1 Siderf. 26; 1 Co. 127 b; Co. Litt. 271 b.

(s) Dyer, 155, pl. 20; 1 And. 37; O. Ben. 28; N. Ben. 28.

(r) Br. N. C. 284; Poph. 81.

155. And if A. enfeoff B. in fee to the use of C. and his heirs, with proviso, that if D. pay C. 100*l.* that C. and his heirs shall stand seised to the use of D. and his heirs, this is utterly void, for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cest' que use*. And it was held by them, that the feoffees since the statute had a possibility to serve the future use when it came in *esse*, and that in the mean time all the uses in *esse* shall be vested; and when the future use comes in *esse*, then the feoffees (if the possession be not disturbed by disseisin or other means) shall have sufficient estate and seisin to serve the future use when it comes in *esse* to be executed by force of the statute, and that seisin and execution by force of the statute ought to concur at one and the same time.

And this case is not to be resembled to cases at the common law, for an act of parliament may make division of estates; and forasmuch as this division is made by act of parliament, it is not necessary that the feoffees should have their ancient estates. And they said that this construction was just and consonant to reason and equity, for by this construction the interest and power that every one hath will be preserved by the act; for if the possession be disturbed by disseisin or otherwise, the feoffees will have power to enter to revive the future uses according to the trust reposed in them; and if they by any act bar themselves of their entry, then this case (not being remedied by the act) doth remain as it was at the common law. And the Chief Justice and Fenner said, that if a man makes a feoffment in fee to the use of one for life, and after to the use of the feoffee (feoffor) in tail upon contingency, and after the contingency happens, in that case the feoffee is the donor as it is proved by 2 E. 6, Br. Formedon, 41 (*t*); 7 E. 6, Ib. 46 (*u*); Plowd. Com. 59; 20 El. (*x*), Dyer, 362; but it would be absurd, that the feoffee should be donor, and yet should have nothing, but be only as an instrument, or as the wind out of an organ-pipe. And Fenner put the cases in 7 H. 6, 3 a; 13 R. 2, tit. Dower, 55; 29 Ass. pl. 64. If tenant for life makes a lease to him in reversion for the life of him in the reversion, although the lessee had but a freehold and departed with a freehold, yet the lessee hath a possibility which by the death of him in the reversion may come in estate. So although the estate of the feoffees be transferred to the uses in *esse*, yet a possibility doth remain in the feoffees, which may be reduced to

(*t*) 1 Co. 47 b.
(*u*) Ib.

(*x*) 1 Co. 47 b; 2 Co. 72 b; 1 Jones, 179; Dy. 362, pl. 21.

an estate sufficient to serve the future uses. And he said, it was not strange that an act in law should alter the original estate, but then the new estate ought to be as near the ancient estate as may be, so that all interests may be served and saved according to the intent and meaning of the parties; as in the case of Littleton, and (y) 2 H. 4, 5 b. If a man makes a feoffment in fee upon (z) condition to make an estate to husband and wife in special tail, and before any gift made, the husband dies without issue; now by this act in law, the estate shall be made to the wife for her life without impeachment of waste, &c., and so by an act in law the original estate was altered.

And Baron Clark said, some have supposed these future uses were preserved in the bowels of the land, and that the land should be charged with them in whose hands soever it should come; and some have supposed they were preserved *in nubibus*, and in the custody of the law, but he said in our case be they below in the land, there they should be perpetually buried, and should never rise again, and be they above *in nubibus*, in the clouds, there they should always remain, and should never descend; for he said that the sons of Ch. Chudleigh in our case were not born in due time, and as this case is, they should never take the future use. And he put many good cases, when a son born out of fit and due time should not take, and upon that he put the case of ravishment, in (a) 5 E. 4, 6 a, when the son is born after the entry of the daughter, and (b) 9 H. 7, 25 a (c); 30 Ass. pl. 47, when the remainder limited to the right heirs of J. S. first vests in the daughter, and after the son is born; and many good cases were put by him to the same purpose. And further he said, as in the case of (d) Kidwelly, Plowd. Com., the lessor by the original agreement of the parties may come upon the land, to demand his rent, although the estate of the land be transferred to another; so by the original agreement of all parties the feoffee may re-enter and revive such future uses, which by the law may be revived; and in such cases he said, that when the future uses shall come in *esse* the feoffees shall have by force of the act a qualified estate sufficient to serve the future uses, and resembled it to the case in 21 E. 3, 41 b; King E. 3, gave lands to the (e) Black

(y) Br. "Condition," 33; Fitz. "Condition," 5; 11 Co. 83 b; 2 Co. 81 a, b.

(z) Litt. sect. 252; Co. Litt. 218 b, 219 a, b.

(a) 1 Co. 95 a; 3 Co. 36 b, 61 b; Fitz. "Assize," 27; Plowd. 43 a, 56 b; Br. "Done," 28; Br. "Entry Congeable," 94.

(b) Cro. Car. 87; Hob. 3; 8 Co. 76 a;

Mo. 140; 1 Co. 95 a, 99 a.

(c) Dav. 30 a; Br. "Descent," 24; Br.

"Done," 21; 1 Co. 76 b.

(d) Plowd. 69 b.

(e) Co. Litt. 27 a; Cotton's Records, 671; 8 Co. 16 b, 25 b; Raym. 355; Palm. 89; 1 Roll. Rep. 198; 1 Co. 43 b; Dy. 94, pl. 30.

Prince and to his heirs kings of England, in that case the grantee had a qualified inheritance, for inasmuch as the Black Prince died in the life of his father, and his son Richard was not then king, the land did revert. So all the Justices and Barons of the Exchequer, except Periam, Walmesley, and Gawdy, did conclude, that forasmuch as the stat. of 27 H. 8 doth not extend but to uses in *esse*, and to persons in *esse*, and not to any uses which depend only in possibility; for that reason the contingent uses in the case at bar remain, so long as they depend in possibility, only at the common law, and by consequence they might be destroyed or discontinued before they came in *esse*, by all such means as uses might have been discontinued or destroyed by the common law.

And all the Justices and Barons of the Exchequer did agree with the Chief Baron and Walmesley in this point, *scil.* that these remainders, limited (*f*) in use in the case at the bar, should follow the rule and reason of estates executed in possession by the common law, and therefore they all unanimously agreed that if the estate for life in the case at bar had been determined by the death of the feoffees before the birth of the eldest son, that the said remainders *in futuro*, were void and should never take effect, although the sons were born after, for (*g*) a remainder in use ought to vest during the particular estate, or at least *eo instante* when the particular estate ends, as well as an estate in possession. And it was held by all the Justices that if the contingent use in the case at bar had come in *esse* without any alteration of the estate of the land, that it should be executed by the stat. of 27 H. 8, but the alteration of the estate before it came in *esse* had destroyed it, as it hath been said; but if any such alteration of estate be before the essence of the future use, then the use should not be transferred into possession before the impediment removed, and the estate recontinued.

It was also held by the eight Justices and Barons who argued against the contingent use, that the stat. of 27 H. 8, should not (against the express letter of it) be construed by equity for the maintenance and preservation of these contingent uses, forasmuch as by such construction the mischiefs which were intended to be prevented by the makers of the act would be continued, or greater introduced, as after by the argument of Popham, Ch. Just., as to this point appears. And Pop-

(*f*) Co. Litt. 23 a; 6 Co. 34 a; 1 Co. 3 Co. 21 a; Raym. 54, 413; 2 And. 37; 1 102 b; 2 Co. 53 b; 54 a. Co. 129 b, 130 a, 134 b; Mo. 104; Perk. 12; Palm. 139; Poph. 82.
(*g*) Plow. 25 b, 29 a, b, 35 a; 2 Co. 51 a;

ham, Ch. Just., in his argument said, that by force of the act of 27. H. 8, some uses are executed immediately, some uses are executed by matter *ex post facto*, and some uses are extirpated and extinguished by the act; uses in *esse* draw the possession immediately by force of the act; uses in *futuro* limited agreeable to the rule of the common law, are also, if they come in *esse* in due time, within the purview of this statute; but uses invented and limited in a new manner not agreeable to the ancient common laws of the land, such uses are utterly extirpated and extinguished by this act: for it appears by the express letter of the act, that it was the intent of the parliament to extirpate and extinguish them, and to restore the ancient common law of the land. And therefore he said, if a feoffment be made to the use of A. for life, and after to the use of every person who should be his heir, one after another for the term of the life of every such heir only; in this case, if this limitation should be good, the inheritance would be in nobody, but this limitation is merely void, for the limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession. So if a man makes a feoffment to the use of one in tail with divers remainders over, with a proviso, that if any shall attempt to purchase any *præcipe* against any tenant of the freehold, &c., that his estate shall cease and that then the feoffees shall stand seised to the use of another, &c., such proviso or limitation is against the rule of the law, if it had been conveyed in possession, for he cannot limit new remainders upon such conditions; and at this day, an estate tail in land cannot cease till entry, and no entry or re-entry is given to any but only to the feoffor or his heirs, and not to any in remainder. And he agreed the case which was put before with the proviso, that the estate in tail by limitation of an use shall cease, as if tenant in tail was naturally dead, and not otherwise, for he said, that such limitation would be void if it was limited in possession; and he said, there was no difference at this day between estates conveyed in use and estates conveyed in possession, for the estate and limitation of an use ought to be known to the common law, and governed and directed by the rules thereof. But, he said, the limitation of the uses in this case, as well future as in *esse* were good and lawful, for such estates executed in possession were good; but the future uses were destroyed by subsequent matter, as hath been said: and he said, if such a construction upon the stat. of 27 H. 8, by equity or otherwise, should be made for the maintenance and preservation of future uses, as hath been made by those who have argued on the other side, greater inconveniences would be intro-

duced than were before the making of the stat. 27 H. 8; for he said, the said contruction did tend to the subversion of noble and great families, and to the disinherison of their heirs, so that no land subject to such perpetuities could continue four descents; for if he, who is so restrained and bound with the provisoes of perpetuities, should sell any part of the land for payment of any debts or legacies, or, if he be taken prisoner in the war, for his ransom, or for the preferment of his younger sons, or for advancement of his daughters in marriage, or for any cause or upon any necessity whatsoever, he would forfeit his estate: also, when the eldest son knows he shall have the lands and possessions of his father, whether he will or no, it makes the son become dissolute and disobedient, so that he will not depend upon the government of his father, but refuse to be ruled and directed by him. It would likewise occasion variance and discord in the same blood, and, in effect, tear the bowels of nature, for it would stir up the son (upon every supposition of breach of the provisoes) to put his father out of the land; from whence great suits and troubles would arise to the wasting and subversion of the families, and so of the brother and brother, and of the cousin and cousin; and he who hath such perpetuity ought always to have a counsellor at law at his elbow, for he cannot do any act concerning his land, but his son, or he who is next to the land, watches for a forfeiture; also he who hath an estate subject to such perpetuity, if he hath (*h*) two several farms, out of which two several rents have been reserved, and peradventure where the several usual rents amount but to 40*s. per annum*, and he joins both in one lease for life, and reserves one rent of four marks *per annum*, it is a forfeiture of his estate, for upon this lease the usual and accustomed (*i*) rent is not reserved; so in many other cases if he do not observe the precise form of power which is given him, it will amount to a forfeiture of his estate, and within two or three descents the provisoes and limitations will not be so fresh in memory, that every gentleman can, in every lease which he shall make, follow the precise form of the provisoes. Also if the wives of such persons become incontinent, and have issue by other men than by their husbands, this adulterous generation shall inherit the husbands' lands, whether they will or no. And this would be a great occasion for women to offend, when they know their issues shall inherit, and many other inconveniences would ensue upon such a construction in maintenance of these perpetuities: and so men who intend to overreach the providence

(A) 5 Co. 6 a.

(i) Co. Litt. 44 b; 5 Co. 6 a; Cro. Eliz. 708.

of God, and covet to establish their lands in their blood by these ways, are in truth thereby the cause of the wasting and subversion of their houses. Also no purchaser would be sure of his purchase without an act of parliament, and where, at the common law, if he had purchased the land *bonâ fide* without notice of the use, he had been free of the use, he will be now in a worse case, for, by the construction which hath been made, his lands shall be subject to these future uses.

Also farmers and lessees cannot have any certain and full assurance; for suppose a (k) feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the lessee for life to make leases, so that he reserves the accustomed rent payable to all those who shall have the reversion: if tenant for life makes leases according to his power, the lessees derive their interest out of the first feoffment, how then can the reservation of the rent be good, and how can his heir, or he in the remainder come at it? and if a proviso be added in the original assurance, that the lessees shall pay the rent, or that they shall enjoy it so long as they pay the rent, then, forasmuch as it is (l) no rent, it ought to be paid without any demand, and if he do not pay it, his interest shall immediately cease by the limitation of the use.

Also those who have cause of action will be in a worse case than they were before; for before this statute they might have an action against the pernor of the profits, but now all pernancies of the profits are taken away, as appears 28 H. 8 (m), Dy. 32 a; and Plow. Com. in *Manzel's Case*, and then by such subtle devices as in the case before put, he who hath cause of action will never find one who shall be tenant to his *præcipe*, and so by such construction he will be without remedy.

Also perjury will be increased in respect of the secrecy more than it was before the statute; for no use could have been raised before this act but upon a (n) transmutation of possession, or upon a covenant or full contract by apt words upon good consideration concluded between the parties; but now uses will be determined and raised by words without any consideration, upon a bare imagination and intention only, without any conclusion, covenant or contract. For if one intends, goes about or attempts, &c., he will lose his land, although he does nothing or concludes nothing.

Also the king and other lords will lose their wards, escheats and

(k) 1 And. 273, 274.

(l) 2 Jones, 35.

(m) Dy. 32, pl. 3; Co. Litt. 287 a.

(n) Co. Litt. 371 b.

other profits of their seigniories; for if the said case before put of a perpetual freehold should be maintained, that no heir shall have but an estate for life, and that the inheritance shall be in nobody, what escheat, or ward, or heriot or other profit will accrue to the king or other lords? and he said, it was not the intent of him and the other Justices, to overthrow the tree of (*o*) uses, but to lop the rotten and unprofitable boughs and branches dangerous to the estate of the commonwealth and men's assurances, so that the rest of the tree, which is profitable for the use of men, might the better prosper. And he said, the reason why the (*p*) lord by escheat, or the lord of a villein should not stand seised to an use, is, because the title of the lord is by reason of his elder title, and that grows, either by reason of the seigniority of the land, or of the villein, which title is higher and elder than the use or confidence is, and therefore should not be subject to it. And the reason why a disseisor should not stand seised to an use was because *cestuy que use* had no remedy by the common law for any use, but his remedy was only in Chancery; and because the right of a freehold or inheritance could not be determined in Chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the Chancery to execute an estate to *cestuy que use*, but *cestuy que use* shall compel his feoffees in the Court of Chancery to enter upon the disseisor, or to recover the land against him at the common law, and then the Chancery will compel the feoffees to execute the estate according to the use, and the Chancellor ought to direct uses according to the rules of the common law. And he said, before Richard the Second's time, no act of parliament or other record, nor no book, nor any writing, made any mention of uses of lands, having regard to the very words of the statute. And therefore he said, that (*q*) uses in such sense as we now take them, were not at the common law, but were invented in times of trouble for fear, or in times of peace by fraud; but he said, that confidence was at the common law, but not that which we now call use.

Periam, Chief Baron, held, uses were at the common law; but the Lord Anderson said, uses were neither by the common law, nor by any statute; for he said, uses were but imaginations, and nothing in the consideration of law, or for which the law hath given any remedy, and

(*o*) Poph. 83.

(*p*) 1 Co. 122 a; Jenk. Cent. 195.

(*q*) 1 Co. 121 b, 131 a; Perk. sect. 528;

2 Leon. 15, 16, 17; Bacon's Laws and Government of England, 67; Co. Litt. 273; Lane, 45; Doct. & Stud. lib. 2, c. 22.

that *cestuy que use* had nothing in the land, for if he came upon the land, he was by the law of the land a trespasser to the feoffees. And afterwards, the same Michaelmas Term, judgment was given for the defendant. And note, reader, that in the argument of this case five things were resolved by the Justices for law, besides the said principal matter in law.

1st. It was adjudged in this case, that when there is (r) tenant for life, the remainder in tail, the reversion in fee, and the tenant for life enfeoffs him in the reversion in fee, it is a forfeiture of his estate, and shall devest the estate tail in remainder (s). So, if there be tenant in tail, the remainder in tail; and the tenant in tail enfeoffs him in the reversion in fee, it is a discontinuance; and the difference was taken and agreed when the estate or privity is sole or immediate, and when not, for which see (t) Littleton, 141; 9 E. 4, 24 b; F. N. B. 142 a (u); 41 E. 3; 21 & 41 Ass. 2.

2ndly. That although the warranty of Christopher was collateral, yet inasmuch as it appears, by computation of time, that the eldest son of C. Chudleigh was within age, and at the time of the death of the eldest son the youngest was also within age; and although the youngest son could not enter before the warranty descended upon him, to defeat the warranty, and that he could not take advantage of the non-age of his brother, and although he did not enter in convenient time after his full age; yet this collateral warranty should not bind him, and as to that the case in effect is such; A. hath issue B. and C. infants within age, a lease is made to A. for life, the remainder to B. in tail, the remainder to C. in tail, A., tenant for life is disseised, and afterwards releases to the disseisor with warranty and dies, and it descends upon B. being within age, afterwards B. dies being within age, C. being then his brother and heir and within age, upon whom the said warranty descends, and afterwards C. comes to full age, and three years after his full age enters, his entry is lawful. For it was resolved, that if the entry of an infant be lawful, and he may enter in the lifetime of his ancestor, and doth not enter, the warranty shall not bind in such case; *à fortiori* when the warranty descends upon him, his entry being lawful, and no laches to be attributed to him; but if his entry was not lawful, so that he was put to his action, there the warranty shall bind; and

(r) 1 Roll. 857.

(s) 1 Roll. 634.

(t) Litt. a. 625; Co. Litt. 354 b, 335 a; 1 Roll. 633; Keb. 42 a.

(u) 1 Co. 76 b; Br. "Collusion," 31; Br. "Entry Congeable," 82; Br. "Forfeiture de Ter." 84; Br. "Surrender," 86; 1 Roll. 857; Co. Litt. 335 a.

the same law shall be in the case of a feme covert, when she is put to her action. And if a warranty doth descend upon an infant, he may enter when he will at his full age, and need not enter hastily, or in convenient time after his full age, but let him take care that he doth not suffer a descent after his full age before his entry, for then the warranty will bind him; for which matter see 33 H. 8; Br. Warranty, 84; 3 H. 7, 9; 35 H. 6, 63; 18 E. 3, 3; 18 E. 4, 13; Br. Warranty, 54; 28 Ass. 28.

3rdly. If a disseisor or other, who hath a defeasible title in a manor, grants (x) a voluntary estate by copy, as if a copyhold estate be forfeited to him; or if a copyholder dies without heir, and he grants those lands again by copy, those grants shall not bind him who hath right after he hath recontinued the manor; but such (y) admittances which a disseisor makes to copyholders of the manor, these are good, for these are in a manner judicial acts, and shall bind the disseisee. 17 Eliz.; Dyer, 343.

4thly. That an (z) estate made to one and his heirs during the life of J. S., is but an estate for life, upon which a remainder may depend by the common law, as appears by the books of 11 H. 4, 42 a, 39; (32) E. 3, 25 b; 7 H. 4, 46 a; 8 H. 4, 14 b; 8 Eliz. Dyer, 253 a; 17 E. 3, 48 b.

5thly. That an (a) estate made to one and his heirs on the body of Jane S. begotten, is an estate tail, and no fee simple against the opinion of Ascough, 20 H. 6, fo. 36 b. For all these points were adjudged in this case, as it may appear by the (perusal and) consideration of the case.

[For the points *supra*, see Skinner, 28, 317.]

[See 2 Black. Com. 137, 271, 327, 332, 338, 339, 363; 4 Black. Com. 427, 429, 430; see also cases temp. Lord Hard. B. R. 91, to 97; and 1 Wilson, 274; 2 Wilson, 336; and 1 Lord Raym. 160, 290, 291; 2 Lord Raym. 799, 854, 876.]

(z) 4 Co. 24 a; Cro. Eliz. 699; Co. Litt. 58 b; 1 Roll. 499; Mo. 112, 236, 237; Poph. 71; Owen, 27, 28.

(y) Cro. Eliz. 699; 4 Co. 24 a; 1 Roll. 503; Mo. 112, 236, 237; 3 Bulstr. 215; Poph. 71.

(x) Br. "Estate," 50; Hob. 323; 10 Co. 98 a; Plow. 556 b; 1 Bulst. 135; N. N. C. 14; 3 Keb. 48.

(a) 1 Roll. 837; Co. Litt. 26 b; Poph. 77; 1 And. 810.

TYRRELL'S CASE (a).

In Cur. Ward. Mich. Term, 4 & 5 Phil. and Mary.

[REPORTED DYER, 155 a.]

USE UPON A USE.]—*A woman, by bargain and sale enrolled, granted lands to her son A. and his heirs, habendum to the use of herself for life, and after her decease to the use of A., and the heirs of his body lawfully begotten; and for default of such issue to the use of her own right heirs:—Held, that the use being executed in A. by the statute, the uses in the habendum were void. There cannot be a use upon a use.*

JANE TYRRELL, vidua, pur le somme de 400*l.* paies per G. Tyrrell sa fils et heire apparant (b), per indenture inrolle in le Chauncery anno 4 Ed. 6, bargaine, vende, done, graunt, covenaut, et conclude, al dit G. Tyrrell tous ses mannors, terres, tenements, &c. A aver et tener les dites, &c. (c) al dit G. T. et a ces heires a toutes jours, al use del dit Jane durant sa vie saunz impeachment de wast, et immediate apres sa decesse al use del dit G. T. et de les heires de son corps loialment engendres (d). Et pur default de tiel issue, al use de les heires del dit Jane a toutes jours. Quære bien si le lymitation de ceux uses sur le habendum ne soyt voyde, et impertinent, eo que un use ne poyt estre treat, ou reserve hors d'un use, come semble primâ facie (e). Et icy il covient destre primes un use transferre al vendée, devant que ascun franktenement ou inheritance in le terre poyt estre vest in luy per l'enrolement, &c. Et cest cas ad estre in doubt in le Common place devant cest temps. Ideo quære legem (f), mes semble a toutes les Justices del Common Bench, et a Saunders Chief Justice, que le

(a) Gilb. Uses and Trusts by Sugd. n. (1).
(b) Limitation de uses in cur' ward' et liberationum; 1 Anders. 3, 7; Bendl. 28; Coke, 137 a.

(c) Uses void per 27 H. 8; Dyer, 114,

118, 146, 312.

(d) B. N. C. 60, 284.

(e) 7 Eliz. 2, 3, 5 a; 1 Co. 137.

(f) Crompton's Courts, 53 a, 54 a.

limitation des uses supra est void, &c. Car admit que le statute d'enrolments ne ust estre faits, mes tantum le Statute de Uses in 27 H. 8 (g), donques le cas supra ne poit estre, eo que use ne poit estre ingendre de use, &c. Vide M. 10 & 11 El. fol.

In the principal case of *Dillon v. Freine*, better known as *Chudleigh's Case*, the law of uses and trusts, both before and after the Statute of Uses (27 Hen. 8, c. 10), was very fully discussed, and some important points settled. It is, however, chiefly valuable for the historical account of the events which led to, the policy which dictated, and the arts which eventually defeated the objects of, the statute. Lord Bacon, in his learned Reading, after noticing that upon the law of uses "the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to haven; that is to say, what assurances will stand good, and what will not," adds, "that by the notable judgment, upon solemn arguments of all the Judges assembled in the Exchequer Chamber, in the famous case of *Dillon v. Freine*, concerning an assurance by Chudleigh, this law began to be reduced to a true and sound exposition; and the false and perverted exposition, which had continued for so many years, though never countenanced by any rule or authority of weight, but only entertained in a popular conceit, and a practice at adventure, grew to be controlled." Bacon's Law Tracts, 299.

It is proposed in this Note to consider the law of uses and trusts; first, as it existed before, and, secondly, subsequent to, the Statute of Uses. 27 Hen. 8, c. 10.

I. *Uses and Trusts before the Statute 27 Hen. 8, c. 10.*

In early feudal times the transfer of lands was attended by great notoriety, since by common law they would only pass by solemn livery or matter of record, or by sufficient writing if they lay in *grant*. See preamble to stat. 27 Hen. 8, c. 10. The object of this notoriety was that the lord might always know to whom he might apply for the services due from the tenant, and for the profits arising from such incidents of tenure, as aids, reliefs, wardships, descents or forfeitures. To prevent also the loss of the fruits of tenure, the clergy were not allowed to hold lands in mortmain. See Statute de Religiosis, 7 Edw. 1, stat. 2.

The ingenuity, however, of the clergy, and the necessity of the times, invented what are termed *Uses*; that is to say, beneficial interests in the land distinct from the legal ownership, and dependent at first merely upon the good faith and conscience of the legal owner. Thus, if A. made a feoffment

(g) Cap. 16; Rast. Inrolments, 2; Carth. 272, 273.

to a feoffee, to the use of himself, the feoffee was to all intents the *legal* owner of the lands, and A. was the equitable or beneficial owner; that is to say, the feoffee was liable to all feudal duties and incidents, such as wardships, reliefs and escheats, and the lands were forfeitable for his treason or felony. So likewise it descended to his heirs, and his wife was entitled to dower thereout, and he might exercise legal ownership, both by bringing actions at law in respect of such lands and otherwise. See Butl. Co. Litt. 271 b; Bro. Feoff. al Us. pl. 10; Dy. 9 b; Jenk. 190.

As, however, it would have been against good conscience for the feoffee to arrogate to himself the beneficial ownership, the Court of Chancery, by means of the subpœna, enabled the feoffor or cestui que use to enforce his right to receive the rents and profits, and also compelled the feoffee to convey as the cestui que use should direct, or, upon cestui que use being disturbed, to re-enter or bring an action to recover the possession.

With regard to the use or beneficial interest, Courts of Equity, following in this respect the common law of the land, whether it were of freehold, copyhold, gavelkind or borough-english, allowed it to descend in the same mode to the heirs of the cestui que use as it would have done had he been seised of the legal estate. Sand. Uses, 64.

The use, however, did not attach itself to the land, but to the conscience of the legal owner. Following the definition of Lord Coke, in *Chudleigh's Case*, the use may well be described as "a trust or confidence which is not issuing out of land, but as a thing collateral annexed in privy to the estate and to the person touching the land; scil. that cestui que use shall take the profits, and that the ter-tenant [i. e. the feoffee] shall make estates according to his direction. So that he who hath an use hath not jus neque in re, neque in rem, but only a confidence and trust, for which he hath no remedy by the common law, but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it." Ante, p. 205.

The invention of uses, according to Coke, was attributable to fraud and fear; fear, in times of trouble and civil wars, to save inheritances from being forfeited; and fraud, to defeat due debts, lawful actions, wards, escheats, mortmains, &c. Ib.

The doctrine of uses also gave to persons a power which they had not previously, of in effect devising real property; for instance, lands might be conveyed to feoffees, to such uses as the feoffor might declare; and, by declaring the uses (which would be enforced in equity), he could regulate the disposition of the land after his death. 1 Sand. Uses, 18.

Again, at common law, estates could only be limited in possession or by way of remainder; according to which, upon the natural determination of the prior estate, the succeeding use must, if at all, instantly take effect. By means of uses, however, an estate might be made to take effect in derogation of the former estate, without awaiting its natural determination.

These were termed shifting or springing uses. Moreover other estates, equally unknown to the simplicity of common law, might, as we shall see more fully hereafter, be created by the intervention of uses.

What was essential in order to raise a Use before the Statute 27 Hen. 8, c. 10.

There were certain things essential in raising a use:—First. That there should be a person or persons capable of standing seised to a use. In general, any person, even a feme covert or an infant (*Sand. Uses*, 56), save when they had only a limited interest, such as an estate for life, in tail, for years, or by occupancy (*Ib.* 59), might stand seised to a use. But the king or queen, a corporation, abbé, mayor, commonalty, or persons attainted, could not be feoffees to uses. (*Ib.* 59.)

Moreover, in order that a person could stand seised to uses, it was necessary that there should be, as laid down in *Chudleigh's Case*, privity in the estate and confidence in the person. For instance, from want of *privity* of estate, a lord by escheat, or the tenant in dower or curtesy of a feoffee, or a disseisor, abator, or intruder of the feoffee, could not stand seised to a use, as they are not, to use the words of Coke, in in the *per*, that is to say, *under* the feoffment, but are in in the *post*, that is to say, by a title either paramount or extraneous to that of the feoffor. *Butl. Co. Litt.* 272 a, II.

There must also have been *confidence* in the person to raise the use as well as *privity* of the estate. Thus in the case put by Coke, "If the feoffee to an use upon good consideration enfeoffed another who had no notice, here is *privity* in estate, but here is no confidence in the person either expressed or implied, and therefore the use is gone; but if a feoffment be made without consideration to one who hath no notice, there is *privity* in estate, and the law implies notice, and therefore the use remains, but not as a thing annexed to the land, but to the *privity* of the estate. 5 E. 4, 7 b." *Ante*, p. 207; where many other examples are given. And see *Sand. Uses*, 58.

Secondly. There must have been a person capable of receiving or taking a use, and it seems that any person to whom a conveyance of lands might be made might take a use. A use might be declared in favour of the king by matter of record (*Sand. Uses*, 60); and (if a licence were obtained) in favour of a corporation (*Shep. T.* 509); but (although there seems to have been some doubt upon the subject) not in favour of an alien. (*Sand. Uses*, 61.)

Thirdly. There must have been either an express declaration of the use or a consideration whereby it might be raised. Where there was an express declaration of a use, it would be valid, although no consideration were paid. *Sand. Uses*, 61; 32 Vin. Abr. 247, pl. 1, n. If there were no declaration of use, and the grantee or feoffee paid a consideration, a use would be thereby raised or implied for him. *Sand. Uses*, 61.

Where, however, there was no express declaration of use, nor consideration paid by the feoffee or grantee, there would be a resulting use for the grantor or feoffor, who would thereupon be in as of the old use. (Ib.) Any consideration, however small, was sufficient to raise a use for the feoffee. Ib. 62, 63.

Fourthly. There must have been hereditaments out of which the use might arise, such as lands, reversions, remainders. But it could not be raised out of personal inheritances such as annuities (Sand. Uses, 63); nor out of mere rights, such as a right of common, or rights of way in gross. Ib. 64.

Trusts before the Statute 27 Hen. 8, c. 10.

Trusts before the Statute of Uses were of two kinds, which differed from uses, inasmuch as, by the conveyance to the trustees, they not merely took a legal interest in the land, but also the right to take the profits, or to do certain acts, for the special purposes for which the trust was created. For instance, if there were a feoffment in trust or to the intent to convey to a third party, or to re-enseoff the feoffor, or to be vouched, or to suffer a recovery; all these were cases of special trusts, where certain acts were to be done. Sand. Uses, 3; Hayes's Introd. 36.

There were also special trusts unlawful, as they were termed by Bacon, created "to the intent to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the præcipe, or the Statute of Mortmain, or lords of their wardships, or the like; and those were termed frauds, covins or collusions." Bacon, Uses, 8.

It might be supposed at first sight, when the feoffee was put in the place of the feoffor as the legal owner, that as he would be liable to all the incidents of tenure, no great injury would be done to the lord; but the mode of evading these burdens seems to have been, by making a feoffment to several persons, of whom the beneficial owner was usually one, so that upon the death of one, the estate would survive to the others, whose numbers being kept up as occasion might require by other feoffments, the lord would therefore lose the fruits of descents and wardships. Hayes's Introd. 43.

So feoffments might be made to powerful persons in such times above the law, or to persons either unknown or difficult to discover. In short, to use the words of a learned writer, "by the introduction of uses, as well the cardinal maxims of the feudal policy, as many of the subordinate rules of property, were virtually defeated. The clergy who were prohibited by law from purchasing land, but who could now take the profits to any extent, without becoming the legal owners of a single rood, increased their possessions. The factious baron vested his estate in a few confidential friends, and committed treason with comparative safety. The peaceful proprietor, adopting the same precaution, enjoyed and disposed of the beneficial interest, unvexed by the exactions of the lord, and regardless of the rules of the common law." Hayes's Introd. 32, 4th Ed.

Various statutes were passed for the purpose of remedying what were considered the mischiefs introduced by the doctrine of uses, by giving an

action to the disseisee, against cestui que use when a fraudulent feoffment had been made to powerful or unknown persons, for the purpose of defeating his rights (1 Rich. 2, c. 9; 4 Hen. 4, c. 7; 11 Hen. 6, c. 3; 1 Hen. 7, c. 1), and 15 R. 2, c. 5, was passed to prevent religious houses or commonalties from acquiring lands by means of uses in fraud of Magna Charta, c. 6; and 7 E. 1, De Religiosis and other acts were passed to prevent lords losing, by means of uses, their wardships, reliefs, heriots, and other fruits of tenure. See 15 Rich. 2, c. 5; 4 Hen. 7, c. 17; 19 Hen. 7, c. 15.

Another important act, 1 Rich. 3, c. 1 (in effect repealed by 27 Hen. 8, c. 10), gave power to the cestui que use to alien his lands without the consent of the feoffees. The object of this statute was to prevent the litigation and uncertainty which arose from the dishonesty or perversity of feoffees; for as the feoffees were legal owners, they might alien or lease the land, and the purchaser or lessee if for valuable consideration, and without notice of the uses, would hold the estate free from them, and the only remedy of the cestui que use was against the feoffees. A mere volunteer however, or a person having notice of the uses would be bound by them. Again, the feoffees might refuse to join in any conveyance, or after the cestui que use had aliened, they might enter, and thereby give rise to several vexatious suits in Chancery. See ante, p. 209.

The remedies afforded by these enactments were only partially successful, and accordingly the Statute of Uses, 27 Hen. 8, c. 10, was passed, the object of which evidently was, by uniting the legal seisin or interest to the equitable or beneficial interest, entirely to abolish the doctrine of uses. "The intent of the makers of the stat. 27 Hen. 8," says Lord Coke, who most heartily disliked any innovation upon the common law, "was, for a remedy of all the mischiefs (which no statute before, nor all of them together, had made a sufficient provision for), to extirpate and extinguish all uses in such manner as the statute had limited. For the makers of the statute 27 Hen. 8, having maturely examined the said former statutes and provisions of parliament to reform the great abuses of uses in many particular cases, at last resolved, that uses were so subtle and perverse, that they could by no policy or provision be governed or reformed; and, therefore, as a skilful gardener will not cut away the leaves of the weeds, but extirpate them by the roots, and as a wise householder will not cover or stir up the fire which is secretly kindled in his house, but utterly put it out; so the makers of the said statute of 27 Hen. 8, c. 10, did not intend to provide a remedy and reformation by the continuance or preservation, *but by the extinction and extirpation of uses*; and because uses were so subtle and ungovernable, as hath been said, they have with an indissoluble knot coupled and married them to the land, which of all the elements is the most ponderous and immovable." Ante, p. 211.

II. *Uses and Trusts after the Statute 27 Hen. 8, c. 10.*

Whatever may have been the intention of the legislature, it will be seen hereafter, that the legal estate by the operation of the statute was endowed with most of the flexible properties of the use, and from the determination of the Courts of Law, of which *Tyrrell's Case* is one of the earliest examples, that there could not be "an use upon an use," the equitable or beneficial interest might again be severed from the legal ownership, 261, post.

Uses after the Statute 27 Hen. 8, c. 10.

In order to show the effect of the statute of 27 Hen. 8, c. 10, upon which our modern system of conveyancing is mainly founded, it is proposed to consider,—First, The nature of uses since the statute of 27 Hen. 8, c. 10, and what is essential in order to raise them; Secondly, As to the effect of the operation of the statute in joining the seisin to the use, and how far limitations to uses agree with or differ from limitations at common law; Thirdly, What objects, either wholly unattainable or imperfectly attainable, at common law, became attainable by means of uses under the statute; Fourthly, As to powers deriving their operation from the Statute of Uses; Fifthly, As to the mode in which conveyances to uses operate; Sixthly, As to declarations of uses; Seventhly, As to whether uses created by wills operate under the statute, and herein as to what is sufficient to confer on a devisee the legal estate; Eighthly, As to uses not executed by the statute; and, Ninthly, It is proposed to make a few observations on trusts since the statute of 27 Hen. 8, c. 10.

1. *The Nature of Uses since the Statute 27 Hen. 8, c. 10, and what is essential in order to raise them.*

By the operation of the statute (see ante, p. 210) in all cases where freeholds were the subject-matter of the conveyance (leaseholds and copyholds not being within the scope of the statute), the use was immediately joined to the possession, so as completely to consolidate them together. In order to raise a use certain circumstances were necessary, viz.—First, a person *seised* to the use or trust; because it is clear that the statute will execute a trust where it is used merely as a convertible term for a use. Thus, if a feoffment be made to A. and his heirs, to the use of or in trust for B. and his heirs, B. has not, as before the statute, a mere equitable or beneficial interest, he becomes to all intents and purposes the legal as well as equitable owner.

So also if an estate be conveyed to A. and his heirs, to the use of B. for life, remainder to C. in fee, the statute divests A. of the whole legal estate, and vests it in B. for life, remainder to C. in fee.

The second requisite to raise a use is a *cestui que use* other than the person standing seised to the use, for if there were a conveyance to A. and his heirs, to the use of or in trust for A. and his heirs, A., as before the statute, would take both the legal and beneficial interest by the common law, and not by

the statute. *Sammes's Case*, 13 Co. 56; *Altham v. Anglesey*, Gilb. Rep. 16, 17; *Long v. Buckeridge*, 1 Stra. 106; *Gnam v. Roe*, 1 Salk. 90. There is, however, an exception to the rule, where, the use of a person not being commensurate with his seisin, a use is limited over to another person; as, for instance, if a conveyance were made to A. and his heirs, to the use of himself in tail, with remainder over to another, or to the use of B. for life, remainder to A. for life, remainder to C. in fee, or to the use of A. and a stranger, in these cases the use would be executed by the statute. Sand. Uses, 94-97.

Another requisite is *a use in esse, in possession, reversion or remainder*, which may be either express or implied.

An express use may be raised not only by the words made use of in the statute, viz. "use," "trust" or "confidence," but by any words which show an intention to create a use. See Bac. Uses, 47; *Hummerston's Case*, Dyer, 166 a, n.; *Betnam v. Bateston*, Ib.; 4 Leon. 22; *Anon.*, 4 Leon. 2, pl. 3; *Boydell v. Walthall*, Moore, 722.

Implied or resulting uses, which, as we have seen, existed before the statute, have not been abolished by it. Accordingly it has been laid down as a general rule, that if a conveyance be made without any consideration or declaration of use, the use will result to the party making the conveyance, and be executed in him by the statute (*Armstrong v. Wolsey*, 2 Wils. 19; Doug. 26; *Beckwith's Case*, 2 Co. 56, 58 b; Sand. Uses, 100); but it seems that a nominal consideration, as of 5s., would be sufficient to show the intention of the parties that there should be no resulting use (Sand. Uses, 104). On the other hand, if there be only a partial declaration of a use, even although there be a valuable consideration given, so much of the use as is undisposed of results (*Wilkes v. Leuson*, Dy. 169; *Wilkins v. Perratt*, Moore, 876; *Piers v. Hoe*, Cro. Eliz. 131; 1 Leon. 125; Co. Litt. 23 a; *Woodliff v. Drury*, Cro. Eliz. 489; *Audley's Case*, Dy. 166 a). Thus, if a feoffment be made for valuable consideration by A. to B. in fee, to the use of B. for life, and no further declaration be made, the remainder of the estate, after the life-interest of B., results to A., and is executed by the statute. See Sand. Uses, 104. The ground for holding in such a case that there is a resulting trust is this, that the express declaration of the use as to part shows the intention of the parties that the feoffee is to take the remainder of the use. But if it appeared upon the face of the deed by a recital, for instance, that it was the intention of the feoffee to purchase the whole estate, there would be no resulting use to the feoffee, but to the party from whom the consideration moved. *Pelly v. Maddin*, 21 Vin. Abr. 498, pl. 15; Sand. Uses, 105.

Parol evidence may be used to rebut a resulting use. *Lamplugh v. Lamplugh*, 1 P. Wms. 112; *Roe v. Popham*, Dougl. 26.

Another requisite to the raising of uses is, that there must be, as a subject-matter, some *hereditaments in esse* (not being copyhold), either corporeal or incorporeal, in possession, reversion or remainder. Thus no use will

arise by virtue of a covenant to stand seised of lands of which the covenantor may *afterwards* become the purchaser. *Yelverton v. Yelverton*, Cro. Eliz. 401; Moor, 342; 2 Roll. Abr. 790; Sand. Uses, 107.

A grant of a rentcharge de novo to uses may be made within the statute, the land being the seisin out of which it arises. Bac. Uses, 143.

The Statute of Uses, after reciting, in the fourth section, that "where divers persons stand and be seised of and in any lands, tenements or hereditaments, in fee simple or otherwise, to the use and intent that some other person or persons shall have and perceive yearly to them, and to his or their heirs, one annual rent of 10*l.*, or more or less, out of the same lands and tenements, and some other person one other annual rent to him and his assigns, for term of life or years, or for some other special time, according to such intent and use as hath been heretofore declared, limited and made thereof." It is by the 5th section enacted, "that in every such case, the same persons, their heirs and assigns, that have such use and interest, to have and perceive any such annual rents out of any lands, tenements or hereditaments, that they and every of them, their heirs and assigns, be adjudged and deemed to be in possession and seisin of the same rent, of and in such like estate, as they had in the title, interest or use of the said rent or profit, and as if a sufficient grant or other lawful conveyance had been made and executed to them, by such as were and shall be seised to the use and intent of any such rent, to be had, made or paid, according to the very trust and intent thereof; and that all and every such person and persons as have, or hereafter shall have, any title, use and interest in or to any such rent or profit, shall lawfully distrain for nonpayment of the said rent; and in their own names make avowries, or by their bailiffs or servants make conisances and justifications, and have all other suits, entries and remedies for such rents, as if the same rents had been actually and really granted to them with sufficient clauses of distress, re-entry or otherwise, according to such conditions, pains, or other things limited and appointed upon the trust and intent for payment or surety of such rent."

Another requisite to the execution of a use by the statute is, that the feoffee or grantee have a *seisin* at the time of its creation commensurate with the use, for the cestui que use cannot, under the statute, take an estate more extensive than the seisin. Thus if land be conveyed to A. for life, to the use of B. for life, in tail or in fee, B. will under the statute take an estate determinable on the death of A. *Cranley's Case*, Cro. Eliz. 72. And see Dy. 186 a; Vaugh. 49; Bac. Uses, 47; Cro. Car. 231; 3 Bulst. 184; Sand. Uses, 100.

Much discussion has arisen in determining where the seisin is upon which the statute operates, in the case of springing or contingent uses during their suspense and when they came into existence.

Thus, if an estate were conveyed to feoffees and their heirs to the use of A. for life, remainder to his first and other sons (then unborn) in tail, remainder to B. in fee, the difficulty arose in this way, as it was necessary

that there should be a person seised to the use of the person to whom the use was limited, where and how was a seisin to be found in the feoffees to serve the contingent remainders to the first and other sons when they came into existence? Some contended that the legal estate or use continued in the trustees in remainder expectant on the estate of freehold: others, that there remained in the feoffees unexecuted by the statute a possibility of seisin, or as it was fancifully termed a *scintilla juris et tituli*, to serve the contingent uses as they became vested (Sand. Uses, 110—114). A third party contended that the seisin was at once impressed upon all the uses, so that, in the case put, B. would take a *qualified* though vested estate, subject to be divested upon the birth of a son of A. See Hayes's Introd. 59. This is the view very forcibly put by Periam, C.B., and Walmesley, J., in *Chudleigh's Case*, against the majority of the Judges. Some writers are warm in favour of the doctrine of *scintilla juris*; but the great weight of authority is against it and in favour of the doctrine which supposes the seisin of the feoffees to be sufficient to serve the contingent uses whenever they arise. Pollexfen, in his very able argument in *Hales v. Risley* (Pollexf. 384), has given a summary of the reasoning upon this subject, with some very pertinent remarks upon the observations of the Judges in *Chudleigh's Case*.

The reasoning of Lord St. Leonards is conclusive upon the subject. "Where," asks his Lordship, "is the necessity for any *scintilla juris* in the feoffees? As we are compelled to hold that the estate is executed in the remainderman, so as to exhaust the seisin of the feoffees until the rising of the use, what is there in the act which should enforce us to say that the estates shall not open, and at once let in the contingent uses as they come in esse? The intention of the act was to divest the feoffee of everything: he was seised to the use of the unborn cestuis que use, and when they come in esse the words of the statute are satisfied: the common law is in a great measure restored, which it is agreed was the intention of the act; and a fiction is got rid of, as to the mischievous consequences of which we never advert; for no inquiry is ever made to meet the difficulties which arise from this doctrine." 1 Sugd. Pow. 41.

In order to raise a use there must be either a direct or actual conveyance operating by way of transmutation of possession, or a contract or covenant operating as a bargain and sale, or a covenant to stand seised to uses. (Sand. Uses, 114.) A mere *executory* covenant (*Bainton's Case*, Dy. 96; *Blitheman v. Blitheman*, Cro. Eliz. 279; *Buckler v. Symons*, 2 Roll. Abr. 788; *Wingfield v. Littleton*, Dy. 162; *Audley's Case*, Ib. 166 a) or contract (*Trevor v. Trevor*, 1 P. Wms. 622; *Edwards v. Freeman*, 2 P. Wms. 435, 447) to convey or settle lands upon certain uses, will not raise a direct use, but requires a further conveyance or settlement to be executed for that purpose. Sed vide *Hylton v. Biscoe*, 2 Ves. 304, 308.

2. *As to the Effect of the operation of the Statute in joining the Seisin and the Use, and how far Limitations to Uses agree with or differ from Limitations at Common Law.*

By the operation of the statute all estate in the land is taken out of the person seised to uses; the estate therefore will not, as we have seen was the case before the statute, on account of the feoffee or releasee to uses, be liable to escheat, forfeiture, dower or curtesy (*Sneyd v. Sneyd*, 1 Atk. 443; Sand. Uses, 119). On the other hand the estate of the cestui que use, which before the statute was only equitable, by its operation becomes legal, and therefore subject to all the legal incidents of a legal estate, as escheat, forfeiture, curtesy, dower, on account of the cestui que use. Sand. Uses, 119.

In general, limitations to uses receive the same construction as similar limitations at common law: thus in order to create an estate in fee simple (Sand. Uses, 122), or in fee tail (Ib. 123), the same words are necessary as in the case of a conveyance at common law.

So likewise, as is laid down in *Chudleigh's Case*, it is necessary that a use limited by way of remainder should take effect if at all before or immediately upon the determination of the particular estate, in the same manner as in the case of a conveyance at common law. Hayes's Introd. 67.

3. *What Objects either wholly unattainable or imperfectly attainable at Common Law became attainable by means of Uses under the Statute.*

Although, as we have seen in some respects, uses executed by the statute, by converting the equitable into a legal estate, follow the rules of common law, nevertheless, the owner of freehold interests may, through the medium of uses executed by the statute, deal with his property with the same freedom as he could have done with the use before the statute. It becomes, therefore, important to examine what interests can be created by uses executed by the statute which cannot be created at common law.

At common law a person cannot convey or deliver seisin to himself as tenant for life or jointly with another (Sand. Uses, 129; Perk. s. 203), or as tenant in tail, or as remainderman in tail after a prior life interest in a stranger (*Greswold's Case*, Dy 156 a). In all these cases the estate limited to the owner would be absolutely void, and in the latter case he would take as reversioner not as a remainderman, and the only mode by which he could limit to himself such interests at law would be by conveying the estate to a third party, from whom a reconveyance might be taken conferring upon him the above-mentioned partial interests. By means, however, of the statute acting upon uses all those interests may be limited by one deed. Thus A. may convey his estate to B. to the use of himself A. for life, or to the use of himself and B. jointly, or to the use of B. for life or in tail, remainder to the use of himself A. in tail. Hayes's Introd. 96.

Again, as husband and wife are at law considered as one person, a man cannot make a direct conveyance at common law to his wife (Co. Litt.

3 a, 112 a; *Moyse v. Gyles*, 2 Vern. 385; *Lucas v. Lucas*, 1 Atk. 271, note 2, Sand. Ed.). Under the Statute of Uses A. may convey to B. and his heirs, to the use of his (A.'s) wife for life, or any other interest. Co. Litt. 112 a.

Again, at common law joint tenants must take at the same time (Co. Litt. 9 a, 188 a; 2 Roll. Abr. 417, pl. 8); and if there be a conveyance to two persons, one capable and the other incapable of taking, the one who is capable takes the whole (1 Co. 100 b; 13 Co. 57). Through the medium, however, of the Statute of Uses joint tenants can take at different times. Thus, if A. convey to B. and his heirs to the use of C. and any wife he may marry, although C. would take the whole estate at first, yet on his marriage his wife will take a joint interest with him. *Mutton's Case*, Moore, 96; *Dyer*, 274 b; 1 Co. 101 a; *Sanmes's Case*, 13 Co. 57; *Stratton v. Best*, 2 Bro. C. C. 233.

At common law no estate of freehold can be made to commence *in futuro*. Thus, if a grant were made to A. to commence in a year's time, the grant is void (Sand. Uses, 136). But if a man covenanted to stand seised, or bargained and sold lands, to future uses, as to the use of the heirs of his own body (22 Vin. Abr. 283; Carth. 263), or to the use of another person after his own death (*Osman v. Shenfe*, 3 Lev. 370; *Roe v. Tranmer*, 2 Wils. 75), or after a certain number of years (Bac. Uses, 63), the grant will be good, inasmuch as until the future event happens, there will be a resulting use to the covenantor or bargainor, in whom the seisin, to serve the future uses, remains. So, under an instrument operating by transmutation of possession as a feoffment or release, future uses may be created, if there be a commensurate seisin to serve them when they arise. Thus, if there be a conveyance by A. to B. and his heirs, to the use, after the expiration of four years, or, after the death of A., of C. and his heirs, the limitation to C. and his heirs is valid, inasmuch as during the four years, or during the life of A., there will be a resulting use to him, which will be executed by the statute (2 Salk. 675; Sand. Uses, 137); if, however, A. had executed a conveyance to B. and his heirs, to commence at a future period, as, for instance, after the death of A., to the use of C. and his heirs, it would have been void, as a freehold cannot be made to commence *in futuro*. *Roe v. Tranmer*, 2 Wils. 75; *Lamb v. Archer*, 1 Salk. 225.

At common law, it is a maxim that no estate can be limited after a fee simple. Thus, if a feoffment be made to A. in fee, with a proviso that on a certain event happening it should go over to B., the limitation to B. is void. See Co. Litt. 18 a; *Seymor's Case*, 10 Co. 97 b; *Dy.* 33 a; 1 Co. 85 b. Under the Statute of Uses, it is clear, that such limitations, termed "springing or shifting uses," would be good. See *Pells v. Browne*, and note, post.

It was, indeed, urged in *Chudleigh's Case*, that it would be wrong to make "any estate of freehold and inheritance lawfully vested, to cease as to one, and to vest in others, against the rule of law, and that no estates

should be raised by way of use but those which could be raised by livery of seisin at common law." That reasoning, however, did not prevail.

Since, however, shifting uses, limited after estates in fee simple, cannot be barred (*Lloyd v. Carew*, Prec. Ch. 72), it was necessary to confine them within due limits, which was effected by means of the Rule against Perpetuities (see *Cadell v. Palmer*, and note, post), according to which, unless the event upon which the limitations over took effect necessarily took place within a life or lives in being and twenty-one years after, such limitations are void. The rule, however, is not applicable where the limitations over are after an estate tail, as the tenant in tail might at any time, by barring it, acquire a fee simple, and thus defeat the limitations over, which do not therefore require to be confined to take effect within the time prescribed by the Rule against Perpetuities. *Page v. Hayward*, 2 Salk. 570; *Goodiar v. Clarke*, 1 Sid. 102; 1 Lev. 35; *Cadell v. Palmer*, and note, post. These shifting uses are similar to executory devises, as to which see the note to *Archer's Case*, and *Pells v. Brown*, post.

Again, at common law, every remainder must be limited, so as to await the regular determination of the particular estate before it can take effect in possession. Plowd. 24; *Cogan v. Cogan*, Cro. Eliz. 360; *Fearne*, 9, 390, 394, ante, p. 236. Under the Statute of Uses, however, a particular estate may be made to determine by the happening of some event before its natural determination. Thus, if a conveyance be made to A. and his heirs, to the use of B. in tail or for life, provided that if C. return from Rome, then to D. in fee; on the return of C. the limitation to D. will take effect, by destroying the estate of A. before its regular determination (2 Leon. 16), but the tenant in tail could in the case lastly mentioned, at any time before C.'s return from Rome, bar the limitation over. *Page v. Hayward*, 2 Salk. 579; Sand. Uses, 153.

It must, however, be remembered, that by means of a *conditional limitation* the same effects may be produced as by springing or shifting uses. Thus, if a feoffment be made to A. and the heirs of his body until C. return from Rome, and after C.'s return to B. in fee; here, upon C.'s return the limitation to B. will vest, inasmuch as the estate of C. thereupon determines by the nature of its limitation (W. Jones, 58; Sand. Uses, 152); but if the gift had been to A. in tail, *provided or upon condition* that if C. return from Rome then to B. in fee; in this case the limitation could not take effect as a remainder, because the estate tail could not cease without an entry by the grantor or his heirs, which entry would defeat the remainder (Co. Litt. 214 b; W. Jones, 58; Plowd. 413; Sand. Uses, 152); but, as we have before seen, the limitation over to D. would take effect through the medium of the Statute of Uses acting upon the seisin of a releasee or feoffee to uses. See further on this subject, Sand. Uses, 151.

4. As to Powers deriving their Effect from the Statute of Uses.

The shifting or springing uses which we have already noticed, take effect upon the happening of some event, mentioned in the instrument,

creating the limitations which are thereby defeated. Another kind of shifting or springing use is that which takes effect through the instrumentality of some person named in the instrument, who designates certain uses by an *appointment* under an authority to him for such purpose given—which is termed a *power*—he being called the donee of the power, and the person who confers it the donor of the power. As to the different kinds of powers, their extinguishment and suspension, see *Edwards v. Slater*, and note, post.

An appointment, whether the power conferring it precedes, or is subsequent to limitations to uses, has in each case the same effect, viz. that of defeating the limitations. In both cases it takes effect as a power of revocation and appointment, although a power of revocation need not in the former case be expressly conferred. (Co. Litt. 272 a, Butler's note, VII.)

In all cases, however, an appointment takes effect as a declaration of uses, and the statute executes the possession by drawing to them the seisin created by the instrument giving the power.

Thus, if an estate were conveyed to A. and his heirs to the use of B. for life, remainder to such uses generally, or to such son of B. as B. should appoint, and B. appoints to the use of his first son in fee, immediately upon the appointment (subject to B.'s life estate) the son would take the legal fee, the seisin of A., by operation of the statute, being joined to the declaration of the use in favour of the son.

If in the case supposed power had been given to A. with the consent of B., or to B. to sell and exchange, to lease, to make a jointure for a wife, or charges for children, immediately upon the execution of the power, which would operate as a declaration of a use, the legal seisin of A. would be joined thereto by the statute. The appointment operates without transmutation of possession. Thus, if a person having a general power of appointment by deed, appoint to A. to the use of B., the use to A. will by means of the statute receive the accession of the legal estate, and B. will only take an equitable estate.

In general an appointment takes effect, in the same manner as if it had been inserted in the instrument creating the power. Thus, if an estate were conveyed to A. and his heirs to the use of B. for life, remainder to such uses as C. should appoint, and in default of appointment to the use of C. and his heirs, C. afterwards appoints the estate to D. for life, remainder to D.'s first and other sons in tail male; the result would be the same as if the original deed had been to A. and his heirs, to the use of B. for life, remainder to D. for life, remainder to D.'s first and other sons in tail male, remainder to C. and his heirs. See Co. Litt. 272 a, Butler's note.

5. *As to the Mode in which Conveyances to Uses operate.*

In considering in what mode conveyances to uses operate, as the seisin is added by the statute to the use, it is material to know accurately in whom, by the different instruments adopted by conveyancers, the seisin is vested,

inasmuch as some instruments operate by, others, without transmutation of the possession.

Instruments operating without Transmutation of Possession.

A bargain and sale, and a covenant to stand seised operate without transmutation of possession. A bargain and sale is considered as a contract, whereby the bargainor, in consideration of money, bargains and sells and contracts to convey an estate to the bargainee. Thus, if A. executed a bargain and sale to B., the seisin before the Statute of Uses remained in A., and after the statute was executed in B. Hayes's Introd. 68.

The operation of a covenant to stand seised (the consideration for which is blood or marriage) is similar. For instance, if A. on the marriage of his son B. covenanted to stand seised to the use of B. and his heirs for ever, the seisin, which before the statute would have been in A., would by it be transferred to the use of B. Ib. 69.

Instruments operating by Transmutation of Possession.

Instruments operating by transmutation of possession are feoffments, grants, and fines and recoveries (lately abolished). Thus, if A. enfeoffed B. to the use of C., the seisin is conveyed from A. to B. and by operation of the statute it is joined to the use in C. To these may be added the lease and release, the origin of which was as follows. Many evils having been found to result from the secrecy of instruments not requiring livery of seisin, or not being of record, in order to give publicity to transfers of land the Statute of Inrolments (27 Hen. 8, c. 16) was passed, by which bargains and sales were to have no effect in regard to *freehold* interests, unless made by deed indented and enrolled within six months from the date thereof. This was called a bargain and sale enrolled. The ingenuity of lawyers, perceiving that the statute did not apply to leasehold interests, soon invented a mode of defeating the object of the legislature and of passing lands without the publicity intended. This was by the instruments known by the name of Lease and Release. The conveying party, by bargain and sale, conveyed the land to the purchaser for a nominal consideration for a year, which by the operation of the statute gave him the legal estate for a year, and he therefore became tenant in possession of the vendor without entry; and at common law the vendor might then release his remaining interest or *reversion* to the tenant. And neither the lease nor the release required inrolment.

This mode of conveyance remained for a long time in use, until the lease was made unnecessary by 4 & 5 Vict. c. 21, which rendered a release as effectual for the conveyance of freehold estates as a lease and release by the same parties. And by 8 & 9 Vict. c. 106, s. 2, "after the 1st October, 1845, all corporeal tenements and hereditaments as regards the conveyance of the immediate freehold thereof, are deemed to lie in grant as well as in livery; but every deed, which by force only of that enactment is effectual as a grant, is chargeable with the stamp duty, with which the same deed would have

been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable."

It is important to bear in mind the distinction between instruments operating by, and those operating without, transmutation of possession, otherwise much confusion will arise in determining to whom the legal estate belongs. Thus, if property be conveyed by an instrument operating by transmutation of possession, as a feoffment, lease and release, or grant by A. to B. and his heirs, to the use of C. and his heirs, then the seisin is conveyed from A. to B. and executed by the statute in C. If in an instrument not operating by transmutation of possession, as a bargain and sale by A. to B. to the use of C. here, as the seisin remained in A., but is executed by the statute in B. who takes the legal estate, C. takes only an equitable estate, "as there cannot be," as is laid down in *Tyrrell's Case*, "a use upon a use."

6. *As to Declarations of Uses.*

Formerly declarations of uses, being intended to be secret, rested merely in parol between the feoffee and the cestui que use; but since the Statute of Frauds (29 Car. 2, c. 3) declarations of trust must be in writing. By the 7th section of that statute it is enacted, "that from and after the 24th day of June (1677), all declarations or creations of trusts or confidences of *any lands, tenements or hereditaments* shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Instruments not operating by way of transmutation of possession, as a bargain and sale, a covenant to stand seised, and an appointment under a power, are mere declarations of uses, to which the seisin vested in the bargainor, covenantor, or (in the case of the power) in the feoffee or releasee to uses, is executed by the Statute of Uses.

In instruments operating by transmutation of possession, the uses may be declared, either in the same or in a distinct instrument. The former is usually the case in a feoffment, or lease and release, or (what is now substituted for the latter) a grant.

Before fines and recoveries were abolished by 3 & 4 Will. 4, c. 74, uses might be declared by a deed executed either previously or subsequently to the fine or the recovery being levied or suffered (4 Anne, c. 16, s. 15). If the deed were executed before the fine or recovery it was said to *lead*, if after, to declare the uses and trusts thereof, and in neither case was it necessary that a consideration should be expressed. Harg. Co. Litt. 123 a, note 8; 1 Id. Raym. 290; Sand. Uses, 219.

Where a fine or recovery was made in conformity with the deed leading the uses, the latter might be varied or completely altered *before* the fine was

levied or the recovery suffered; but the variation or alteration could only be made with the consent of all the parties interested (*Shep. Touch.* 519; *Stapilton v. Stapilton*, 1 Atk. 2; 2 L. Cas. Eq. 593), and by a deed or other instrument of as high a nature as that leading the uses, according to the maxim "*Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est.*" (*Countess of Rutland's Case*, 5 Co. 26a). But if the fine or recovery varied in time, persons or circumstances from the first deed, the uses thereby declared might be varied by an instrument of not so high a nature, for instance, by a mere writing not under seal, executed *before* the fine or recovery (*Jones v. Morley*, 2 Salk. 677), and even it seems *after* (*Ib.*; *Shep. Touch.* 520), if the variation were made by deed (see *Gilb. Uses*, 111, *Sugd. n.*); and it was not essential that all the persons interested in the first declaration should be parties to the second. *Countess of Rutland's Case*, 5 Co. 25 b.

The deed, however, leading the uses will not be controlled by any other executed *subsequent* to the levying of the fine or the suffering of the recovery, where the fine or recovery did not in circumstances vary from the first deed. *Shep. Touch.* 520; *Tregame v. Fletcher*, 2 Salk. 676; 9 Co. 10 b, 11 a; *Comb.* 429; 1 Atk. 9.

The fine or recovery would have enured to the uses of the deed leading them, although not in all respects corresponding in circumstances therewith, if there be no subsequent declaration of uses. *Shep. Touch.* 520; *Haver-gill v. Hare*, 2 Roll. Abr. 799; 1 Atk. 7; 13 Vin. Abr. 306, pl. 2, P. a. 2.

It seems that a declaration of use declared according to 4 Anne, c. 16, s. 15, by deed, subsequent to the fine or recovery, there having been no deed leading the uses, might be controlled by another deed, although there may have been no variance in the fine or recovery. *Tregame v. Fletcher*, 2 Salk. 676; *Vavisor's Case*, *Dyer*, 307 b; *Shep. Touch.* 519, 521.

Where there were two declarations of uses in the same instrument quite contradictory to each other, the former would prevail. *Southcoat v. Manory*, *Cro. Eliz.* 744; *Wilmot v. Knowles*, *Moore*, 680; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Shep. Touch.* 88.

No formal words are essential to the validity of a declaration of a use (*Sand. Uses*, 229); it must, however, be certain, especially as to the persons in whose favour the uses are declared, the estates which they are to take, and as to the lands which form the subject-matter of the declaration. *Ib.*; *Shep. Touch.* 519.

7. *Whether Uses created by Wills operate under the Statute—and herein as to what is sufficient to confer upon a Devisee the Legal Estate.*

Previous to the Statutes of Wills (32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 5), except where lands in particular localities were devisable by custom, the only mode of passing lands by will was by means of a conveyance to uses, upon which a subsequent will, operating as a declaration of use, would be enforced by a Court of Equity. By the statute of 27 Hen. 8, c. 10, the possession being

joined to the use this power of indirectly devising lands was taken away; but having once enjoyed the testamentary power over land the people took the first opportunity of regaining it; accordingly, by 32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 1, power was given by the legislature to devise the whole of lands held in common socage, and two-thirds of land held by knights service. And as by 12 Car. 2, c. 24, lands held by tenure of knights service were converted into socage, all freehold lands became devisable. The question then arose, whether the Statute of Uses, which it will be observed passed before the acts giving power to devise lands, was applicable to lands given by wills. No decision has been actually given upon the point, and, in reality, it is not very material, as in order to carry out the intention of the testator the legal estate is transferred to the use in the same mode as it would be by the operation of the statute. Thus, if there were a devise simply to A. and his heirs, to the use of or in trust for B. and his heirs, B. would take the legal estate (*Sand. Uses*, 243; *Doe d. Booth v. Field*, 2 Barn. & Ad. 564, 570; *Hawkins v. Luscombe*, 2 Swanst. 392; sed vide 1 Sugd. Pow. 6 Ed. 175; *Harris v. Pugh*, 12 Moore, 1, n., 577); and the employment of the words "use" and "trust" indifferently in a series of limitations will not alter the construction. *Doe d. Collier v. Terry*, 11 East, 377. On the other hand a devise unto and to the use of A., to the use of or in trust for B. and his heirs, would, upon the ground that there cannot be a use upon a use, confer the legal estate upon A., the equitable estate upon B. 2 Jarm. Wills, 238.

A difficulty, however, often arises in determining whether a person to whom property is devised to the use of or in trust for another takes the legal estate, or whether it is vested in the person having the beneficial interest. In the case of a simple devise, where the devisee is a mere passive instrument and has no duty to perform, as we have seen, the legal estate passes to the person entitled to the beneficial estate. Where, however, the first devisee has active duties to perform, which require that the legal estate should be vested in him, he will be held to have such legal estate; as, for instance, when he is directed to pay the rents to the cestui que trust (*Doe v. Homfray*, 6 Ad. & Ell. 206; *Doe v. Field*, 2 Barn. & Ad. 564), or to apply them for any purposes, such as payment of rates, taxes and repairs (*Shaplund v. Smith*, 1 Bro. C. C. 74; *Browne v. Ramsden*, 2 Moo. 612; *Tenny d. Gibbs v. Moody*, 3 Bing. 3; 10 Moo. 252), or debts and legacies charged on land, either primarily or in aid of personalty (*Murthwaite v. Jenkinson*, 2 Barn. & Cress. 357), or contingently upon the personalty proving insufficient, if the contingency happens (*Doe d. Cadogan v. Enart*, 7 Ad. & Ell. 636: sed vide *Doe v. Shotton*, 8 Ad. & Ell. 905; *Hawker v. Hawker*, 3 B. & Ald. 537), or for the maintenance of the cestui que trust (*Silvester v. Wilson*, 2 T. R. 444; *Doe v. Ironmonger*, 3 East, 535; *Reynell v. Reynell*, 10 Beav. 21; *Plenty v. West*, 6 C. B. 201; but a mere charge of debts and legacies will not confer the legal estate. *Kenrick v. Beauchlerk*, 3 Bos. & Pul. 175; *Doe d. Müller v. Claridge*, 6 C. B. 641.

Where there is a devise to a person and his heirs, upon trust to permit

another to *receive* the rents, the beneficial owner will also take the legal estate (*Right d. Phillippo v. Smith*, 12 East, 455; *Doe d. Noble v. Bolton*, 11 Ad. & Ell. 188; but see *Gregory v. Henderson*, 4 Taunt. 772), unless it be necessary for some other purpose that the first devisee should have the legal estate, as when the devise is also to preserve contingent remainders (*Briscoe v. Perkins*, 1 V. & B. 485; *White v. Parker*, 1 Bing. N. C. 573; 1 Scott, 542; and see *Riley v. Garnett*, 3 De G. & S. 629); or when the devise is to permit a married woman to receive the rents for her separate use (*Harton v. Harton*, 7 T. R. 652; *Doe v. Woodcock v. Barthrop*, 5 Taunt. 382; *Robinson v. Grey*, 9 East, 1; *Hawkins v. Luscombe*, 2 Swanst. 375); or when it appears that the trustees are to exercise a control, as when the receipts are to be "with the approbation of any one of the trustees" (*Gregory v. Henderson*, 4 Taunt. 772; and *Broughton v. Langley*, Salk. 679; 2 Ld. Raym. 873; 1 Lutw. 823); or where it appears by implication that the trustees are to make certain payments previously to the receipt of the rents by the beneficial owner, as where such beneficial owner is to receive "the *net* rents and profits" (*Barker v. Greenwood*, 3 Jur. 25). In all these cases the first devisee will take the legal estate.

Where in a will there was a devise to two persons, and the survivor of them, his heirs and assigns, upon trust "*to pay unto or permit and suffer A. C. to have, receive and take* the rents, issues and profits of the estate," it was held that A. C. took the legal estate. "The last words," said Mansfield, C. J., "are 'permit and suffer,' which give the cestui que trust a legal estate; and the general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested." *Doe d. Leicester v. Biggs*, 2 Taunt. 109.

Where there is a devise to a person to sell or convey an estate (*Garth v. Baldwin*, 2 Ves. 645; *Doe d. Booth v. Field*, 2 Barn. & Ad. 564; *Doe d. Shelley v. Edlin*, 4 Ad. & Ell. 582), à fortiori if there are other purposes rendering it necessary that he should have some estate (*Bagshaw v. Spencer*, 1 Ves. 142; *Gibson v. Rogers*, Amb. 93; *Sanford v. Irby*, 3 Barn. & Ald. 654; *Doe d. Edlin*, 4 Ad. & Ell. 582; but see *Hawker v. Hawker*, 3 Barn. & Ald. 537), the devisee will take the legal estate.

The circumstance of the estate being limited to the trustees, "their executors and administrators," and not to the trustees "and their heirs," would not affect the vesting of the fee in the trustees, if the purposes of the will required it. Per Lord Langdale, M. R., in *Hardson v. Williamson*, 1 Keen, 33.

A direction to trustees to sell (*Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636; but see *Hawker v. Hawker*, 3 Barn. & Ald. 537; *Doe v. Shotton*, 8 Ad. & Ell. 905), and (although this may admit of doubt) to grant leases of indefinite duration (*Doe d. Tomkyns v. Willan*, 2 Barn. & Ald. 84; *Doe d. Keen v. Walbank*, 2 Barn. & Ad. 554; see, however, *Acland v. Lutley*,

9 Ad. & Ell. 879; 1 Per. & D. 636; *Ackland v. Pring*, 2 M. & Gr. 937; 3 Scott, N. R. 297), as contradistinguished from mere powers, have been held to confer upon the trustees a legal inheritance. A fortiori when the trustees, having authority to lease, are directed out of the rents and profits to make such payments as for taxes and repairs. *White v. Parker*, 1 Bing. N. C. 573.

It has been held, that the appointment of persons as trustees of inheritance for the execution of a will (*Trent v. Hanning*, 1 Bos. & Pul. N. R. 116; 10 Ves. 495; 7 East, 97), or of a person as "executor of a will, so far as was necessary for the performance of the trusts relating to the testator's real estate" (*Plenty v. West*, 6 C. B. 201), vested in them the legal fee. See also *Anthony v. Rees*, 2 Cr. & Jer. 75; *Doe d. Gillard v. Gillard*, 5 B. & Ald. 785; *Re Hough's Will*, 4 De G. & Sm. 371.

We have already seen that devisees will take the legal estate, if it be necessary that they should have it, for the purpose of carrying out active trusts. In such cases, however, the duration of the legal estate is limited by that of the trusts, and will be carried no further. Suppose, for instance, there be a devise to A., his heirs and assigns for ever, upon trust to pay and apply the rents to the separate use of B., a married woman, for life, and after her decease to the use of the heirs of her body, in this case A. would take the legal estate during B.'s life, because it is necessary that he should have it, for the purpose of receiving the rents and paying them to B.; but, as the necessity ceases upon her death, his legal estate would then determine. *Doe d. Hallen v. Ironmonger*, 3 East, 533; *Robinson v. Grey*, 9 East, 1; *Cooke v. Blake*, 1 Exch. 220; *Playford v. Hoare*, 3 Y. & J. 175; *Adams v. Adams*, 6 Q. B. 860; sed vide *Farmer v. Francis*, 9 Moore, 310.

A similar rule prevails in conveyances by deed to trustees (*Venables v. Morris*, 7 T. R. 342; *Blaker v. Anscombe*, 1 Bos. & Pul. N. R. 25). And it seems even in the case of a deed (à fortiori, then in the case of a will), where trustees take the legal estate expressly, and not merely by implication from the necessity of their having it to perform certain duties, it will last only so long as a duty is to be fulfilled by the trustees. See *Curtis v. Prive*, 12 Ves. 89.

Where an appointment is made by a will under a power, as it is a mere declaration of use, the person nominated will take the legal estate, although he may have no active duties to perform, and although it may be stated to be "to the use" of another person, such person will only take an equitable estate. 2 Jarm. Wills, 252.

The same result will follow in the case of a devise of copyholds (*Houston v. Hughes*, 6 Barn. & Cress. 403; 9 Dowl. & Ry. 464), or leaseholds. 2 Jarm. Wills, 253.

But even in the case of copyholds, the legal estate, according to the general rule, will be carried only so far as is necessary to effectuate the several intentions of the will. Thus in *Doe d. Woodcock v. Barthrop*, 5 Taunt. 382, where there was a devise to A. & B. and their heirs, in trust

to permit M. A. Shipwash to enjoy the same, or to pay to or permit and suffer her to receive the rents during her life, for her separate use, and, subject to such estate, to such persons as she should by her will appoint, and in default of appointment to her right heirs. It was held by the Court of Common Pleas, that the appointee, by the will of M. A. Shipwash, took a legal estate, although the trustees had never surrendered to the use of her will, and she had never been admitted tenant. "In this case," said Heath, J., "the trust is sufficiently executed by limiting to the trustees a base fee determinable with the life of M. A. Shipwash. The legal estate, therefore, goes over from them when that estate determines. It is admitted that it would be so, if the devise were to the trustees and their heirs during the life of M. A. Shipwash; and it makes no difference whether those words are there expressed or omitted. The question was raised, whether there was a springing use; this is no springing use, if it were, the legal estate must remain in the trustees, that the use might spring."

Under the old law, where an estate was devised to trustees, without any limitation of the quantity of interest, for a limited purpose, as for payment out of rents and profits of legacies and debts (*Cordall's Case*, Cro. El. 315; *Carter v. Barnadiston*, 1 P. Wms. 505; 2 Eq. Ca. Abr. 224, pl. 5, 6; 3 Bro. P. C. 64, Toml. Ed.; *Hitchens v. Hitchens*, 2 Vern. 403; Prec. Ch. 133; sed vide *Gibson v. Montfort*, 1 Ves. 485), or a gross sum (*Doe d. White v. Simpson*, 5 East, 162), or incumbrances (*Hardson v. Williams*, 1 Keen, 83), with remainder to persons to whom the beneficial interest is given, the legal estate given to the trustees is merely a chattel interest for an indefinite term of years, and if the trust were for payment of an annuity, the trustees would take an estate pur autre vie (*Doe d. White v. Simpson*, 5 East, 162), but in all these cases the estate of the trustees will cease on the satisfaction of the limited purpose, the person entitled to the beneficial interest thereupon taking the legal estate.

But even under the old law, if *some* of the purposes of the will required a greater estate than one pur autre vie, or for an indefinite term, the trustees would take the legal fee. Thus in *Harton v. Harton*, 7 T. R. 662, a testator devised lands to two persons and their heirs, upon trust to permit a feme covert to receive and take the rents and profits during her life for her separate use, and after her decease, "then to the use" of the first and other sons of her body, and in default of such issue, "to the use" of all and every her daughters as tenants in common in tail; and in default of such issue, the testator devised his estate (without inserting any new limitation) upon trust to permit another married woman to receive the rents for her separate use for life, with similar remainders over to the use of her first and other sons in tail, and to her daughters in tail as tenants in common; and in default of such issue, upon further trust to permit another woman to receive the rents to her separate use for life, with similar remainders to her sons and daughters in tail, remainder to his cousin S. P. in tail; and in default of such issue to his the testator's own right heirs for ever. The Court of King's Bench

certified to the Court of Chancery, "that the legal estate by way of use executed in fee simple vested in the trustees, that construction being necessary (as they conceived) to give legal effect to the testator's intention, to secure the beneficial interest to the separate use of the several *femes covert*." See also *Hawkins v. Luscombe*, 2 Swanst. 391; *Brown v. Whiteway*, 8 Hare, 145; *Toller v. Attwood*, 15 Q. B. 929; *Doe d. Müller v. Claridge*, 6 C. B. 641.

Although a devise to trustees to preserve contingent remainders and their heirs may not be restrained (as is usual), expressly to the life of the person taking the immediately preceding estate of freehold, it will be so restrained if there be no object appearing in the will, which renders its further duration necessary. Thus in *Doe d. Compere v. Hicks*, 7 T. R. 433, where, after a devise to one for life, the deviser limited the estate to trustees *and their heirs*, in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease, and he afterwards gave other life interests, with several remainders over, and after each estate for life he interposed the same estate to trustees *and their heirs*. It was held by the Court of King's Bench, that the estates of the trustees were confined to the lives of the several tenants for lives, and that consequently those in remainder took legal estates, there being no other circumstances in the will to show a contrary intent. "Taking the whole instrument together," observed Lord Kenyon, C. J., "it appears that the testator intended that the trustees should only take during the lives of the several tenants for life, in order to protect the contingent remainders, though the words 'during the life of the tenant for life,' are not inserted in the will in the limitations to trustees. If he did not intend this, all the subsequent remainders to the trustees were absolutely nugatory. The doubt merely arises from the inaccurate penning of the will, which was evidently drawn by a person ignorant of the profession. What I rely upon is this, that taking the series of limitations all together, it appears that the deviser thought that the whole interest in the estate was not vested in the trustees by the first limitation, because he thought it necessary afterwards to give them the same estate after all the subsequent estates for life." See the remarks of Sir W. Grant, M. R., 12 Ves. 100.

It may here be remarked, that in *Venables v. Morris*, 7 T. R. 342, 437, Lord Kenyon held, that trustees to support contingent remainders under a limitation to them and their heirs generally, took the legal fee, upon the ground that a person taking under the limitations a power of appointment, might possibly create contingent remainders under the power, which might require for their protection the fee to be vested in trustees. Although, however, in some other cases it seems to have been considered that the fact of there being contingent remainders was an argument in favour of trustees taking the fee (*Doe v. Willan*, 2 Barn. & Ald. 84; *Houston v. Hughes*, 6 Barn. & Cress. 420; and see *Barker v. Greenwood*, 4 Mees. & W. 421; and *Cursham v. Newland*, 2 Scott, 113), that was not deemed conclusive

by Lord Langdale, M. R., in *Hardson v. Williamson*, 1 Keen, 33; it may therefore well be doubted whether the doctrine of Lord Kenyon, in *Venables v. Morris*, would at the present day be considered law.

In order to obviate some of the difficulties arising from the rules of construction which have been before examined, it has been enacted by the new Wills Act (1 Vict. c. 26, s. 30), "that where any real estate (other than, or not being a presentation to a church,) shall be devised to any trustee or executor, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

By section 31, it is enacted, "that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue, beyond the life of such person, such devise shall be construed to vest in such trustee the fee-simple, or other the whole legal estate, which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

7. *As to Uses not executed by the Statute.*

Copyholds are not within the Statute of Uses (Co. Cop. 54; Cro. Car. 44; 2 Ves. 257), and at law copyholds can only be transferred by means of a surrender into hands of the lord, so that he may admit the person in whose favour the surrender is made, the surrender and admittance being entered on the rolls of the Court. Any uses, however, declared upon a surrender, are now binding directions upon the lord, and, unfettered by the rules of common law, may be made subservient to all the various limitations (*Boddington v. Abernethy*, 5 Barn. & Cress. 776) and powers (*The King v. The Lord of the Manor of Oundle*, 1 Ad. & Ell. 283; 3 Nev. & Mann. 484) to which, as we have before seen, freeholds are subject, the legal tenant of the copyholds being trustee for the persons having equitable interests. *Lewis v. Lane*, 2 My. & K. 449.

Leaseholds, or terms of years and other chattels, are not transferable under the Statute of Uses, because the statute is considered only to be applicable when any person or persons stand "seised" to the use of another, the word "seised" being a technical expression, not having reference to chattel interests. Thus if leaseholds were assigned to A. to the use of B. the legal estate would remain in A. who would be trustee for B., although if it had been a freehold estate, as we have already seen, the legal estate by force of the statute would have vested in B. Much inconvenience has arisen from

chattel interests not being within the Statute of Uses, especially where on the appointment of a new trustee of leaseholds, in the place of one who has died or is about to retire; for the continuing or surviving trustees cannot, as in the case of freeholds, by one deed transfer them to releases to the use of themselves and the new trustee; but they must first be transferred by one deed to a third person, who by another deed afterwards transfers them to the old and new trustees. See 5 Martin's Convey. 275, 284.

8. *As to Trusts since the Statute 27 Hen. 8, c. 10.*

It was doubtless the intention of the legislature, by the Statute of Uses, to prevent the creation of equitable interests, by joining the legal to the equitable estate. This intention, however, was entirely overthrown by the decisions of the common law judges, as in *Tyrrell's Case*, that there could not be "a use upon a use;" that is to say, if land were conveyed by a deed operating by transmutation of possession to A. and his heirs, to use of B. and his heirs, to the use of C. and his heirs, they held that the statute would execute the use in B. but would not go any further, and consequently that C. could take no interest under the statute. So if there was a deed operating without transmutation of possession, as for instance, in *Tyrrell's Case*, a bargain and sale by A. to B. to the use of C., here as B. had the first use, to which by the operation of the statute the seisin of A. was attached, the Courts of common law, considering that the virtues of the statute were exhausted, held that B. took the legal estate and C. took nothing. As, however, it was clear that C. was intended to take the beneficial interest, the Courts of Equity, upon a bill being filed, held, that B. was only a trustee for C. The result of such decisions was, that the distinction between legal and equitable ownership, which existed before the statute, was again introduced. And "by this means," Lord Hardwicke has observed, "a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add, at most, three words to a conveyance." 1 Atk. 591.

Lord Hardwicke's observation, if confined merely to the intention of the framers of the act to suppress the distinction between the legal and equitable estates, is correct; but he might have added that one important effect of the act still remained, viz. that by which the legal estate was, as we have seen, endowed with all the flexible qualities of the use.

The *uses* upon which the statute operated retained their original name, those upon which the statute did not operate were termed *trusts*; of the law relating to which a few observations only will be made, as it comes within the boundaries of equity jurisprudence, and has already been illustrated at considerable length in the Leading cases in equity.

Trusts are of different kinds: the first general, as where the legal estate merely is vested in the trustee, and the cestui que trust is in equity entitled to the rents and profits, and has power to dispose of the lands. The second special, such as a trust to accumulate, to sell, and distribute or convert into

other funds, with or without the consent of the cestui que trust. And thirdly, all trusts may be divided and executed or executory trusts.

As a general principle in dealing with trust estates Courts of Equity are governed by the same rules as Courts of law are, with respect to legal estates. Thus trust estates, whether they be freehold, copyhold, gavelkind or borough english, have the same descendible properties as if they had been legal estates of lands of such tenures. *Sand. Uses*, 270.

So, likewise, trusts of leaseholds devolve in the same manner to the personal representatives as legal terms. *Hunt v. Baker*, 2 Freem. 62.

Upon the same principle, trust estates are in equity assignable. *Warmstuy v. Tanfield*, 1 Ch. Rep. 29; 2 L. Cas. Eq. 532.

Upon the same principle it was held, that a husband might be tenant by the curtesy of trust of inheritance (*Watts v. Ball*, 1 P. Wms. 108; *Chaplin v. Chaplin*, 3 P. Wms. 234; *Casborne v. Scarfe*, 1 Atk. 603); and, by analogy, the wife ought to have been held entitled to dower of a trust estate; however, by a mistaken notion of convenience to purchasers, it was held that she was not so entitled (*Radnor v. Vandebendy*, Show. P. C. 69). This departure, however, from the correct principle has been remedied by the legislature; and now a widow (not being an alien), if married after the 1st January, 1834, is dowable out of her husband's trust estates. 3 & 4 Will. 4, c. 105, s. 2.

As to the escheat and forfeiture of trust estates, see post, note to *Attorney-General v. Sir George Sands*.

Although the old Statutes of Limitation (32 H. 8, c. 2, and 21 Jac. 1, c. 16) did not expressly extend to proceedings in equity, nevertheless Courts of Equity, as between *cestui que trust* and *strangers*, considered themselves by analogy bound by those statutes (*Smith v. Clay*, 3 Bro. C. C. 639, n.; *Hovenden v. Lord Annesley*, 2 S. & L. 629); but now Courts of Equity act not merely by analogy, but in obedience to the new Statute of Limitations (3 & 4 Will. 4, c. 27). See 1 Y. & C. Exch. Ca. 439, 440.

Where, however, there is a notional conversion of land into money or money into land, the land or money, differing in this respect from the legal estate, will, in equity, partake of all the qualities of the property into which it is so converted. See *Fletcher v. Ashburner*, 1 L. Cas. Eq. 534.

As to the difference which exists between the merger of legal and equitable estates, see *Forbes v. Moffatt*, and note, post.

As to trusts executed and executory, see note to *Shelley's Case*, post, and *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 1, and note.

By 29 Car. 2, c. 3, s. 7, "all declarations or creations of trusts or confidences of any lands, tenements or hereditaments, must be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing;" and by the 9th section it is enacted, "that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise."

As the statute does not extend to mere personalty, trusts thereof may be declared or created by parol. *Nab v. Nab*; 10 Mod. 404; *Fordyce v. Willis*, 3 Bro. C. C. 587; 1 P. Wms. 9; *MacFadden v. Jenkyns*, 1 Hare, 458.

There is no particular form required for a declaration or creation of a trust (Sand. Uses, 315); a mere term of request or recommendation, if the subject and object thereof be precisely stated will create a trust. *Harding v. Glyn*, 2 L. Cas. Eq. 685.

Resulting and constructive trusts are exempted from the operation of the Statute of Frauds (see 29 Car. 2, c. 3, s. 8), which consequently remain upon the same footing as before the passing thereof.

For instance, constructive trusts, arising from a person purchasing with notice of an equity (*Le Neve v. Le Neve*, 2 L. Cas. Eq. 21, *Mackreth v. Symmons*, 1 L. Cas. Eq. 194), and upon dealings by a person with another towards whom he stands in some fiduciary relation (*Fox v. Mackreth*, 1 L. Cas. Eq. 72, *Keech v. Sandford*, Ib. 32), or resulting trusts, as upon the purchase by one person in the name of another (*Dyer v. Dyer*, Ib. 138), and upon the failure of the purposes for which conversion has been directed (*Ackroyd v. Smithson*, Ib. 557) will arise, although there be no declaration in writing respecting them.

The law relating to trusts, by which a great proportion of the property in this country is regulated, far exceeds the law of uses, from which it sprung, both in bulk and importance. It has from time to time been moulded into its present shape by our equity judges, and though not free from defects, the evils which Lord Coke and other common law judges anticipated would arise from them have not been realized. On the contrary, "by steadily pursuing from plain principles trusts to all their consequences, and by some assistance from the legislature, a noble, rational and uniform system of law has since been raised. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud or private mischief, which the Statute of Henry 8 meant to avoid." 1 Wm. Blacks. 160. As to the law of trusts, see Lewin on Trusts and Hill on Trustees.

EDWARDS v. SLATER.

Pasch. 17 Car. II. in Scaccario.

[REPORTED HARDR. 410.]

POWERS, DIFFERENT KINDS OF, THEIR EXTINGUISHMENT AND SUSPENSION.]—*A. B., by fine, settled lands to the use of himself for life, with a proviso, that if he should make a jointure on his wife, and a lease for thirty-one years, to commence after his death, for raising portions for his daughters, that then the conusees of the fine should stand seised to these uses ; and limited remainders over in tail, and the reversion to himself in fee. Afterwards he made a jointure pursuant to the power, and then bargained and sold the lands by deed enrolled in trust to raise portions, &c., and afterwards took back a reconveyance from the bargainees by feoffment. He then made a lease for thirty-one years, to begin after his death, to raise portions for two of his daughters, and he and his wife levied a fine sur conuissance de droit. A. B. afterwards died. It was held by the Court of Exchequer, dissentiente Turner, B., that the power to lease for thirty-one years was not destroyed by the bargain and sale or the reconveyance ; and that although the tenant for life by that bargain and sale passed away his life estate and his reversion, yet it did not touch the estates tail ; and that, till the remainder in fee came into being, the power was collateral, and in gross quoad the remainders in tail, which were precedent to it ; and that, consequently, the entry of a person by the direction of the lessee for thirty-one years was lawful.*

IN *ejectione firmæ*, upon a special verdict, the case was thus, viz. —A man settled lands by fine to the use of himself for life, with a clause in the deed of uses to this effect ; that if he should make a jointure to his wife, and make a lease for thirty-one years, *to commence after his death*, for the raising of 3,000*l.* for his daughters' portions,

that then the conusees should stand seised to those uses: and limited divers remainders over in tail, the reversion in fee to himself. Afterwards he made a jointure pursuant to this power, and then he bargained and sold the lands to other persons in fee, by deed enrolled, in trust to raise portions, &c.; the bargainees afterwards reconveyed the lands to him in fee by feoffment: then he made a lease for thirty-one years, *to begin after his death*, for the raising of 3,000*l.* for the portions of two of his daughters only, and he and his wife after that levied a fine *sur consauance de droit*, &c., and afterwards he died. A person by the direction of the lessee for thirty-one years entered, and whether his entry were lawful or not, was the question.

Mr. Trevor, for the plaintiff, made several points in the case.

First, he urged that, by the bargain and sale, the tenant for life had departed with all his estate, so that afterwards he had no such power, as to make a lease for thirty-one years. And upon this head he considered *quid operatur* by a bargain and sale, as well before as after the Statute of Uses (27 Hen. 8, c. 10).

Before the statute a fee simple would have passed without the word "heirs," and all the estate that the bargainor had, as appears, by 27 Hen. 8, 5; Dyer, 225. And since the statute nothing is left in the tenant for life, as appears, by *Seymor's Case*, 10 Co. 95b; and see post. So if tenant in tail bargain and sell *totum statum suum*, *Dimmock's Case*, Hob. 136; *Smith's Case*, 2 Bulstr. 163; 1 Cro. 896 (a); 1 Cro. 157. And the powers in this case arise and pass out of the interest and estate of the tenant for life.

Secondly, by the reconveyance to the tenant for life in fee, he is now in of a new and other estate, and consequently his power lost and gone; see 9 Hen. 7, 1, the case of a tenant by the curtesy, who had made a feoffment in fee upon condition, and entered for the condition broken: he was held not to be in after his re-entry, in privity of his former estate of tenant by the curtesy; see *Digges's Case*, 1 Co. 174; and 5 Hen. 7, 11; 11 H. 4, 2; Co. Litt. "Homage Ancestral;" Co. Litt. 252; that privity of estate is destroyed by a feoffment.

Thirdly, he insisted, that the powers here were repugnant, unreasonable, inconsistent and contrary to law, viz. that the tenant for life, should have both these powers to make a jointure, and a lease for thirty-one years to commence after his death; that the first of these

(a) *Sir Christopher Heydon's Case.*

destroyed the latter; both the jointure and the lease being to commence in interest at one and the same time: as if a lease for years be made, and afterwards another lease be made to begin at the same time, if the second lease be without deed, it is void; and if it be by deed, it is good only for the surplusage of time, if there be any, unless the reversion pass by attornment, as appears; 3 Cro. 160; 4 Jac. *Starkey and Dryop's Case*, Plow. Com. 432; *Fitz-Williams's Case*, 6 Rep. 32. Likewise, the power here is not pursued, if it were originally good; for the lease here made is only for the raising of portions for *some* of his daughters and *not* for all; and the power was executed before, by making a conveyance to other persons for the raising of portions, viz. by the bargain and sale. And although a power be not duly executed, yet if a man has ventured on such or such a course and method of executing it, and have missed, he shall not afterwards execute it *de novo*. As if an office or inquisition be taken before commissioners, and they have not followed their commission, they shall not take upon them to find anew; see 14 Edw. 4, 2; 32 Hen. 6, 10; *Digges's Case*, 1 Co. 157. An use once revoked cannot be revoked again, though the words are *toties quoties*. So of a recovery in value, 14 Ed. 4, 2, Recovery in Value, 32. Besides, this is an hypothetical power, it begins with an "if," which is not direct and positive; and may be wholly defeated and destroyed by the destruction of the estate to which it was annexed, as in the case of accruers, *Lord Stafford's Case*, 8 Co. 73; and Plow. Com. 481, 489, which, if once they be disturbed and displaced, will never revive again.

Fourthly, here the last fine has barred the lease by non-claim; for the first conusees have not made an entry to preserve it, but, as the jury has found, another person has entered by their direction, which does not amount to a command. And a claim to avoid a fine must be precise and certain, see Litt. tit. "Continual Claim;" 3 Cro. 31; Bract. lib. 5, fol. 436; Flet. 444. See More's Rep. 450, concerning the manner of making claim to avoid a fine, and that it must be certain and precise, see 3 Cro. 577; *Fitzhugh's Case*, 3 Leon. 221; *Margaret Podger's Case*, 9 Co. 104.

Serjeant *Newdigate*, for the defendant.— Here is a good power, both to make a lease and to make a jointure, and the one does not destroy the other. Each arises out of the primitive estate, and not out of the estate of the tenant for life, and is a power collateral to his estate,

and therefore is not destroyed by a conveyance made by him, as was adjudged in *Phitton's Case*, that a lease and release destroyed not such a power, and especially where the tenant for life passes away only such an estate as he may lawfully pass, and by a bargain and sale no more passes from him than he may lawfully convey, nor does such a conveyance make any displacing of estates.

Objection. It is unreasonable to have an estate charged with two such powers. *Resp.: Cujus est dare ejus est disponere.* And they may well stand together, and depend one upon the other; and, perchance, the jointure may determine in the life of the tenant for life, or within a short time after his decease, and then the lease will be good for the residue of the term, see 2 Cro. 348. And in *Berry and Riche's Case* (b), in the Common Pleas, it was lately adjudged, that if a man has a power to make a lease for years, where there is another lease in being, there if he makes a lease to commence in præsentī, the power is well executed, and the second lease shall continue as long as it may, taking effect in possession, after the determination of the first lease. See More's Rep. 618. And a direction to enter is here sufficient; for *quod quis facit per alium facit per se.* And a command precedent, or an assent subsequent, in such case is sufficient, as in *Margaret Podger's Case*, 9 Rep. 104; Litt. 416; Co. Litt. 282; Dyer, 331. And in a special verdict, at least, such finding shall be good. See *Fulwood's Case*, 4 Co. 64; *Earl of Shrewsbury's Case*, 9 Co. 42.

Hale, C. B.—Here have been many material questions stirred on the plaintiff's behalf. First, whether these powers are well raised? And it should seem that they are, because the estates to be limited by them, shall take effect according to their precedency; and there may very well be a residue of the term for years, left unexpired after the determination of the jointure; which sufficeth. Secondly, whether or not the power be well executed, as to the lease for thirty-one years? And the power seems to be well executed by the second conveyance, though not by the first, viz. by the bargain and sale; because it was neither made for a jointure nor was it a bargain and sale for thirty-one years, but passed away all his estate and his reversion in fee; and so was not pursuant to his power, and therefore the power was not well executed by that conveyance. Thirdly, whether here be a good claim made to avoid the fine? But there needs no claim in the case, because this lease is only a future

(b) This is probably intended for *Berry v. White*, since reported Bridg. Rep. by Ban. 82.

interest, and therefore not touched by the fine. *Saffyn's Case*, 5 Co. 123. And if it were requisite, an entry by his direction, that ought to enter, which is found here, suffices in a special verdict. Fourthly, whether this bargain and sale have destroyed the power. Fifthly, whether it be destroyed by the reconveyance? As to these two points, it will be hard to say, that the reconveyance has destroyed it; because it is not the act of the party that had the power. And it is hard to say, that the bargain and sale has done it; because the power is collateral, and the estate to be limited does not arise out of the tenancy for life, but out of the first estate. It would be much clearer and a stronger case, if the tenant for life had a power generally to make a lease for years, to say, that the lease should arise out of his estate, than this of ours is, in which the lease for years is not to commence till after the death of the tenant for life, and therefore cannot be incident to his estate. And in Noy's Reports, it is held, that a covenant to stand seised in fee does not destroy such a power. Though that may be questionable, because the whole estate is there disturbed; whereas the bargain and sale here displaces nothing. And if the bargainor had a power of revocation, he might well execute it after the executing this conveyance. But he said he would not deliver any opinion in the case. Et adjournatur.

Afterwards in Easter Term, anno 19 Car. 2, the Court delivered their opinions seriatim.

Rainsford, B.—The sole question here is, whether this lease for thirty-one years be well made or not? The jointure is out of doors, for that is barred by the fine, and the collateral warranty in the fine does not bar the issue in tail, because he is under age. So that the question is single, and concerns the lease for years *only*, viz. whether the power to make a lease for thirty-one years, to commence after the death of the tenant for life, be well executed or not? And here are two things to be considered;—first, the bargain and sale, and the consequences thereof; secondly, the reconveyance by feoffment, and the consequences of that. As for the bargain and sale, that does not displace any remainders limited to other persons. So that notwithstanding it, the power remains, and nothing is passed away by it, but what the tenant for life might lawfully pass. Secondly, the reconveyance by feoffment, that indeed divests all the remainders, and makes the feoffee to be in of a new estate, *Chudleigh's Case*, 1 Co. 113; *Seymor's Case*,

10 Co. 95 a. And it may be doubted, whether or not the power be not thereby suspended till the estates be recontinued by an entry? but I hold it is not. First, it is collateral to the estate of the tenant for life, not being to commence till after his estate be determined, and therefore it cannot be destroyed by a feoffment. *Albany's Case*, 1 Co. 107; and *Digges's Case*, Ib. 157. And it is the same case then as where the power is in a stranger, *Whitlock's Case*, 8 Co. 69. And the estate here is revested by a re-entry. And if a tenant for life assigns over, that does not obstruct his power of making a lease, to commence after his death; for a collateral power remains notwithstanding the estates be disturbed; as in 15 Hen. 7, 11, *Albany's Case*, and *Digges's Case*. A power given to executors or to feoffees to sell, remains after the estate is disturbed. Secondly, the estate here is recontinued by the entry of the tenant in tail, after the death of the tenant for life, which is found here by the verdict. See *Chudleigh's Case*, ante, p. 200.

Objection: The power cannot be said to be collateral with respect to the remainder in fee, which was in the tenant for life, and passed by the bargain and sale. Resp.: There is a diversity betwixt a condition and a power. A condition cannot be apportioned, but a power may, for one is not favoured in law as the other is: see Co. Litt. 215, 237; Hob. 312. And as long as the estates tail remain, the power shall be deemed collateral, but not after they are determined. In this case they continue as yet. And he concluded pro defendente.

Turner, B.—There are two questions in this case. First, whether this power be well created? And I hold it is. Secondly, whether it be well executed? And I hold it is not, because it is destroyed by the bargain and sale; nor is it collateral; if it were, it would not be destroyed, according to *Albany's Case*, and *Digges's Case*. But here it savours of the land. If a feoffor had reserved such a power originally, it would not have been held to be collateral. And though the land do not pass from him that has such a power, yet, if such person have an estate in the land, the power is not collateral. Co. Litt. Cond. last leaf. And it might be mischievous, if the power were held to be collateral; for then if the tenant for life should grant a rentcharge, and afterwards make a lease, &c., he would avoid his own act. But because it savours of the land, it is gone by the bargain and sale, and passes together with the land, and amounts to a confirmation by reason of the

estate in fee expectant. As in *Dutton v. Engram*, 15 Jac. ; 2 Cro. 427; if tenant in tail, remainder to him in fee, grant a rent in fee, the rent continues after the expiration of the estate tail, and the grant works by way of confirmation, by reason of the remainder in fee; and the grant purports an estate in fee, though it be not really such; so here. And he concluded pro querente.

Hale, C. B.—The fine and non-claim do not bar this future interest, not being here displaced and turned to a right. And the powers of making a jointure and a lease, as aforesaid, are consistent; for during the continuance of the jointure, the lease shall not take effect in point of interest, but shall go on in time, and the residue of the term that remains unexpired, after the death of the jointress, shall take effect in interest; and no more. The only question then is, whether or not the power to make a lease for thirty-one years be destroyed? First, powers to raise estates are either simply collateral (as where a party that has such power has not, nor ever had any estate in the land: as where such power is reserved to a stranger, and there it cannot be destroyed by such stranger, because it is no more than a bare nomination), or not simply collateral: and these latter are of two sorts. First, appendant and annexed to the estate. Secondly, in gross.

A power of the first sort is, where tenant for life has a power to make leases for one and twenty years or three lives. Such a power is not simply collateral, for if such a tenant charge the land with a rent, and then execute his power, the charge shall not be defeated whilst he lives, *Latche's Rep.* So if he had before covenanted to stand seised to the use of another; because the power in that case is annexed to the estate.

But where the power does not fall within the estate, as here, the tenant for life has a power to make an estate, which is not to begin till after his own estate determined, such power is not appendant or annexed to the land, but is a power in gross; because the estate for life has no concern in it. And yet such a power may by apt words be destroyed by release, or by a fine or feoffment, which carry away and include all things relating to the land. But an assignment of totum statum suum, or other alteration of the estate for life, does not affect such a power; because it is a power in gross.

Now we are to consider whether, as this case is, the power be destroyed? Two things have been urged to prove the power gone and

destroyed. First, the bargain and sale. Secondly, the feoffment and reconveyance to the tenant for life.

In the first of these objections there are two things. First, the tenant for life has passed away his estate for life. Secondly, he has passed away his reversion in fee, by bargain and sale. Resp. to the first objection, the bargain and sale does not touch the remainders in tail; but the estate for life, and the remainder in fee only. And the power here is not annexed to the land, but is a power in gross. If the tenant for life in this case had a power of revocation, and should make a lease, that would not destroy his power, because no estate is displaced by it. And in Hughes's Reports, in 27, 28 Eliz. Cas. 40, a bargain and sale does not pass away, nor affect a contingent use in the bargainor; but a feoffment or a fine would transfer it. And for answer to the second objection, grounded upon the remainder in fee being conveyed, I hold that if the remainder in fee should come in being, the bargainee would not hold the land charged with this lease, because the interest of the remainder in fee would support it, and it is a power annexed to that estate; but till then it is a collateral power, and in gross quoad the remainders in tail, which are precedent to it. But that is not our case; for the question here is not, how the law would have been in case the remainder in fee had been the only estate in being.

Objection: If the fee simple be discharged, then the mesne estates are so too: As in case of a seignory or condition, if the fee be discharged, the mesne estates are so too. Resp.: A power is apportionable, but a seignory or a condition is not. As a warranty, though it be destroyed as to the fee simple, yet it continues annexed to the mesne estates. This was *Alderman Garraway's Case*; a lease for a hundred years being made, the reversion was granted for life, and the lessee granted his estate to him in the reversion in fee; and it was held, that the lease for years was not destroyed by meeting with the fee, because by possibility the lease for life might outlast the term. So here, there is a possibility that the reversion in fee may come in possession; and yet the power is not destroyed by it. So if a grantee in fee of a rent purchase a remainder in fee of the land depending upon an estate tail, the rent is not thereby extinct; because there is but a possibility of the remainder in fee coming ever into possession. *Cooke v. Bromehill*, Noy, 66, Pasch. 37 Eliz. No more, in this case, shall the possibility of the remainder in fee coming into possession destroy the power.

A second question is, whether the feoffment has destroyed it, or not? And I hold not; because it never was in the feoffor, nor reserved to him. But there is no feoffment here found, but only a conveyance from the bargainee to the tenant for life, with these words, viz. "grant, bargain, sell, release, enfeoff and confirm." But admitting the power not destroyed, *causa qua suprà*; yet here is a forfeiture of the estate for life, and a displacing of all the remainders.

Object. : The power then is suspended.

Resp. : No; because here William had a right to make such a lease, which is sufficient to support the power. As if tenant for life, remainder to the right heirs of J. S. be disseised, the right remaining in the tenant for life is sufficient to support the contingent remainder; and by the entry of tenant for life, it is reduced together with the estate. So here, if the tenant for life had been disseised, and then had made such a lease, and had entered, this would have reduced the right to an actual estate. And here it is found, that the tenant in tail entered, which reduceth all the estates and interests, and by consequence the lease for thirty-one years. And he concluded pro defendente.

In the important and frequently cited case of *Edwards v. Slater*, the question was very fully and ably discussed by Hale, C. B., how far powers of different kinds are suspended or extinguished by the acts of the donee. The decisions upon the subject are numerous, and by no means free from difficulty; but the principle upon which they either do or ought to proceed is plain, and, if borne in mind in considering the various cases which arise, will go far to enable a person to arrive at a correct conclusion upon them.

The leading principle in determining whether a power is either suspended or extinguished seems to be this, that the intention of the donee of the power in an appointment, whether expressed or implied, should be carried into effect, so far as it does not derogate from any interest of his own which he may have previously granted away out of the estate upon which the power operates. If, previous to the execution of the power, the donee has granted away a part of his estate, then there will be to that extent a suspension, if he have granted away the whole of his estate, then there will be an entire extinguishment, of his power.

This principle, however, is only applicable, as will be hereafter more fully shown, where the donee of the power has also an interest in the estate.

In examining this subject; and the application of the principle before laid down, it becomes important to consider what are the different kinds of powers; and in so doing we cannot adopt a better classification than that of Hale, C. B., in the principal case, viz.—I. Powers simply collateral; II.

Powers not simply collateral ; which last are subdivided into — First, Powers appendant and annexed to the estate ; Secondly, Powers in gross.

I. *As to Powers simply Collateral.*

One of the instances given by the Chief Baron in the principal case, of a simply collateral power to raise estates, is where a party has not, nor ever had, any estate in the land ; and, being a mere stranger, has a power limited to him, ante, p. 283.

Another instance is where a stranger has power to revoke a settlement and appoint new uses to other persons designated in the deed. 1 Sugd. Pow. 42.

This species of power cannot, as is laid down in the principal case, be destroyed. Thus a mere power, without any interest, given to an executor or stranger to sell land, cannot be extinguished or destroyed either by feoffment or release of the donee (*Tippet v. Eyres*, 5 Mod. 457 ; 2 Vent. 115 ; *Quick v. Ludborrow*, 3 Bulst. 29 ; *Albany's Case*, 1 Co. 112 ; *Grange v. Tiving*, Bridg. by Ban. 111), of a stranger or of the owner of the land (*Willis v. Shorral*, 1 Atk. 474.) And a mere refusal of a man having a bare authority to execute it will not disable him from executing it at a future period. See the remarks of Pollexfen, C. J., 5 Mod. 458.

So likewise in the fifth resolution in *Digges's Case* (Moo. 605), it is laid down, "that he who has power to revoke estates, and has no estate himself in the land, cannot, either by fine, feoffment or release, extinguish that power, because it is only an authority, and no interest : as, if there be a devise that a man shall sell certain land, and the party authorized levy a fine or make a feoffment, or release all his right, nevertheless he may afterwards sell the land." And in *West v. Berney*, 1 Russ. & My. 434, Sir John Leach says, "Upon the authorities and principle my opinion is, that a power simply collateral, that is a power to a stranger, who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, that it cannot be released where it is to be exercised for the benefit of another."

II. *As to Powers not simply Collateral.*

1. *Powers Appendant and annexed to the Estate.*

A power appendant is where a person has an interest in the estate to which it is annexed, and his power, as will be hereafter shown, can be either suspended or extinguished, according to the mode in which he deals with such interest.

2. *As to the Suspension of Powers Appendant.*

It is said in the principal case, that if a tenant for life has a power to make leases for one and twenty years or three lives, and he charge the land with a rent, and then execute his power, the charge shall not be defeated while he lives, because the power is in that case annexed to the estate, ante, p. 283.

Upon the same principle, in the well-known case of *Goodright v. Cator*, Doug. 460, where Lord Bolingbroke, the tenant for life of an estate, with powers of revocation and new appointment, demised the estate for ninety-nine years, if he should so long live, to secure an annuity, and afterwards revoked the old uses and appointed the estates to trustees upon trust to sell, and the estate was afterwards sold, counsel for Lord Bolingbroke contended, that as he, being tenant for life, had only a qualified or defeasible interest, he could not alien the estate for his own life, discharged from the qualifications which affected it in his hands, viz. the consequences of the power of revocation. It was held, that the demise to secure the annuity was not affected by the revocation and new appointment. "I cannot," said Lord Mansfield, "frame a doubt upon it. Undoubtedly Lord Bolingbroke had a right to do what he did. It is a right which arises out of the nature of his estate. The question is, whether *the same* Lord Bolingbroke who has made this demise, for a valuable consideration, can be authorized to revoke it under any power in any settlement; for, by the power, the revocation must be executed *by him*. If the purchaser did not know of the incumbrance, there was a fraud upon him. But it is found that he knew of it; and therefore the fraud was upon the annuitant." See also *Piers v. Tuite*, 1 Dru. & Wal. 279.

So a lease granted by a tenant for life out of his interest will not be defeated by a lease made subsequently under a power of appointment. See *Bringloe v. Goodson*, 4 Bing. N. C. 734; remarks by Tindal, C. J.

Again, if a tenant for life of a fund has power to appoint a part thereof for the advancement of his children in his lifetime, he cannot, after having assigned his life interest as a security, be at liberty to lessen that security by exercising the power for advancement. *Noel v. Lord Henley*, Mac C. & Y. 306.

As, however, a husband takes his wife's property liable to all its incidents, an assignment by him of her life interest is, it seems, liable to be defeated by the exercise of a power by her. Thus, in *Whitmarsh v. Robertson*, 1 Coll. 570, by a marriage settlement, certain stock in the funds was settled upon the intended husband and wife for their joint lives and the life of the survivor, and then upon the children of the marriage, with a power to the trustees, with the consent of the wife, to advance part of the fund for the benefit of the children in her lifetime. There were four children of the marriage. The husband died. The wife married again. The second husband assigned the wife's life interest for value. After the assignment, the trustees, with the consent of the wife, exercised the power of advancement in favour of the children of the first marriage. It was held by Sir J. L. K. Bruce, V. C., that the power was well executed as against the assignee of the second husband. "The first question," said his Honor, "is whether, if this sale had not been made, and the second husband and herself had done no such act, she could have exercised this power; that is, whether she could have effectually consented to the trustees acting under the advancement clause, without and against the consent of her second husband. I am of

opinion that she could; that this power of giving the consent was a power with which marriage did not interfere; that she remained immediately after the second marriage at full liberty, and fully entitled, however it might prejudice that life interest to which her husband was entitled, or partly entitled, in her right, to exercise the power of consent, and that the trustees, without and against the consent of the husband, were authorized to give effect to that consent. If that is so, could a sale by the husband of the life interest make any difference? I am of opinion that it could not, and that a purchaser from him stood in no better situation than he would have done if that sale had not been made. The next question is, whether the wife's concurrence in the instrument of sale made any difference. Generally speaking, a married woman cannot execute a deed; she can do no act of this description, except in respect of an estate settled to her separate use or in the exercise of a power given to her. Separate use here is out of the question; there is no such thing. A power has been given to her, but the existence of a power only enables her to do an act under the power conformable to the power; it does not enable her to deal with the subject of the power in any manner not in conformity with the power. Dealing with the subject of the power in a manner not conformable with the power, she deals with all the disabilities of a married woman, and subject to all the considerations which affect the act of a married woman; and as the sale was an act not under the power, and not in conformity with it, I am of opinion that the act is in no sense to be considered her act, and is, as to her, a nullity. I am of opinion, therefore, that her consent is as effectual as it would have been if she had never married, and as if no sale had been made."

Although it is clearly right in principle that a person should not be allowed to exercise a power so as to defeat an estate created by himself out of his own interest, yet there is no reason why a power should be suspended beyond the period of such estate; it would indeed give rise to much inconvenience if a person having granted a lease should not be able, subject thereto, to exercise powers of jointuring or advancement. Thus if a person, having a limited estate in land, with a power of revocation and new appointment, grant a lease and afterwards exercise the power, the lease will not be thereby affected; but, subject to the lease, the right to exercise the power of revocation and new appointment will not be suspended. See *Yelland v. Fickis*, Mo. 788; *S. C.* 1 Roll. Abr. 473 (K), pl. 3, nom. *Yeoland v. Fellis*; *Bullock v. Thorne*, Mo. 615; *Anon.*, Ib. 612; *Snape v. Turton*, Cro. Car. 472; 1 Ch. Rep. 112; *Lord Mordant v. Earl of Peterborough*, 3 Keb. 305. See also *The Attorney-General v. Gradyll*, Bunb. 92.

Although a tenant for life who has granted a lease out of his life interest, cannot afterwards defeat that, by a lease made in execution of a power contained in an instrument of prior date, nevertheless, a lessee under a power cannot set up, by way of defence to an action by a mortgagee under a power to executors contained in the same instrument, an estate granted by the tenant for life out of his life interest. Thus in the case of *Bringloe v. Goodson*, 4 Bing. N. C. 726, where an estate had been devised by will

to a man for life, with power for him to demise for twenty-one years, and for the executors to mortgage in fee or for years. In 1812, after the testator's death, the tenant for life made a grant to Clement for ninety-nine years, if he should so long live. In 1814 he demised, under his power, for twenty-one years. In 1828 the executors mortgaged the estate for 1,000 years under their power. In an action brought by the mortgagee for rent arising under the lease for twenty-one years, it was held by the Court of Common Pleas, that the lessee could not set up as a defence, the interest of the grantee for ninety-nine years. "That the leasing power," observed, Tindal, C. J., "is not *destroyed*, appears to be well established by the cases. The tenant for life not having conveyed away his life estate, but only granted a lease for years to Clement, the utmost effect of this lease is, that the power of leasing has been *suspended* so far as regards *the lease*, and interest of Clement (*Long v. Rankin*, Sugd. Pow. App. No. 2, Dom. Proc.). And if there had been no power created by the will besides that leasing power, and the contest had taken place between the grantee of the term for ninety-nine years, created by the tenant for life, and the lessee for twenty-one years under the leasing power, there can be no question, but that the former must have prevailed, if the leasing power subsequently exercised operated to the prejudice of the grantee. . . . It is well established, that whatever estates are granted by virtue of a power take effect as if they were granted by the deed creating the power. And, consequently, in the present case, the demise for 1,000 years, under which the plaintiff claims, being granted under the power given by the will, operates as if it had been created by the will itself, which gives such power to the executors. And if considered as created by the will, it must of necessity override the lease for ninety-nine years granted by the tenant for life out of his own estate. Again, the lease for twenty-one years, which was granted under the leasing power, *supposing that power not to be absolutely suspended*, must be considered as if granted by the will itself, and, therefore, *in any case not affecting the interest of the lessee*, as overriding the grant made by the tenant for life out of his own estate. . . . As the defendant derives his interest in the lease for twenty-one years from the donor of the power, and as the plaintiff derives his reversionary interest from the same donor, what right can the former have to set up against the latter a lease granted to a third person by the tenant for life? . . . There is no authority in point, and upon principle, we think that there has been *no suspension of the leasing power* given to the tenant for life, so far as regards the grantee of the term under the power to demise by way of mortgage given to the executors; and upon that ground we think such grantee has the immediate reversion in him, and may sue upon the covenants in the lease."

As to the Extinguishment of Powers appendant.

It is clearly established, that where a tenant for life with power of leasing in possession *aliens* his whole life estate, the power is thereby ex-

tinguished, and cannot afterwards be exercised to the prejudice of the grantee. *Berry v. White*, Bridg. by Ban. 91; and see Doug. 293.

Upon the same principle, where property, whether real (*Penne v. Peacock*, Ca. t. Talb. 41; *Webb v. Lord Shaftesbury*, 3 My. & K. 599) or personal (*Cherry v. Boulton*, 2 Keen, 324), is settled upon such uses or trusts as a man shall appoint, and, in default of appointment, to him absolutely, or to a man for life, then to such persons as he should appoint by *will*, and, in default of appointment, to him absolutely, he may by alienation of the property, extinguish the power.

In similar cases, the power will be extinguished, where the alienation of the estate is effected, not by the act of the party himself but by operation of law. Thus in the case of *Doe v. Britain*, 2 B. & Ald. 93, a trader being seised of an estate for life, with a general power of appointment, with remainder in default of appointment to himself in fee, after having committed an act of bankruptcy, upon which he was afterwards declared a bankrupt, executed an appointment in favour of an appointee; it was held by the Court of King's Bench, that all his interest having passed to his assignees, the power of appointment was thereby extinguished. See also *Anon.*, Lofft. 71; *Thorpe v. Goodall*, 17 Ves. 388.

In *Badham v. Mee*, 7 Bing. 695, which was a case submitted by the Master of the Rolls for the opinion of the Court of Common Pleas, a father took an estate for life under his marriage settlement, with remainder to such of his sons as he should appoint, subject to such charges as he should create for the other children, and in default of appointment to his first and other sons in tail general, remainder to the use of his own right heirs.

The father became bankrupt, and executed the usual assignment to his assignees, and *subsequently* executed an appointment to one of his sons in fee, *after the determination of his own life interest*. It was held by the Court of Common Pleas, that the son took nothing under the appointment, but was entitled, subject to his father's life interest, to an estate tail under the settlement. No reasons were given by the Court of Common Pleas upon which its opinion was founded, and upon the case again coming on before the Master of the Rolls (1 My. & K. 32), he confirmed the opinion of the Court of Common Pleas against the validity of the appointment, upon the ground that, by the execution of a power, no estate can be created which would not have been valid if limited in the deed creating the power, and that in the present case, even admitting that the power of appointment continued in the bankrupt, notwithstanding his bankruptcy, and that the appointment in favour of the eldest son in fee might be construed as an appointment creating a base fee only, and not prejudicing the remainder, which passed to the assignees under the commission, the appointment would nevertheless be void, because a limitation to that effect would have been void in the original deed creating the power; inasmuch as the rule of law does not permit one fee to be limited after another, although the first fee be only a limited or a

base fee and his Honor gave no opinion as to whether the power of appointment had been extinguished by the bankruptcy.

The case, however, of *Badham v. Mee*, has since been overruled by the case of *Jones v. Winwood*, 3 M. & W. 653. There lands were settled to such uses as the husband and wife should jointly appoint, and in default of appointment to the use of the husband for life, then to the use of the wife for life, and then to the use of his sons in succession in tail general, and then to the use of the daughters in tail general, with cross remainders, with remainder to the husband in fee. The husband took the benefit of the Insolvent Act, and conveyed all his interest to the provisional assignee, who afterwards made a transfer to the assignee of the estate; *subsequently* the husband and wife, in execution of their joint power of appointment, conveyed the premises to trustees upon trust, for the creditors of the husband. It was held by the Court of Exchequer, to whom the case had been sent by the Lord Chancellor, that the power of appointment was not destroyed by the conveyance to the provisional assignee, and that the power was well executed so as to pass all interest in the premises, except what had previously passed by the assignment under the Insolvent Debtors Act, viz. the husband's life interest and his remainder in fee. "We cannot," said Alderson, B., "adopt the principle laid down by Sir John Leach, in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them. We do not think that it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed. The utmost extent to which the principle could be carried (and looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a Court of Equity would compel them to perform, it may be questionable whether even this ought to be done) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty would be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the Court looks at the other circumstances, and finding that the insolvent had previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life estate and his

remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes therefore that the deed does not operate on the estates previously assigned. The result therefore is, that, by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion, we shall send our certificate to the Lord Chancellor."

The certificate of the Court of Exchequer, in *Jones v. Winwood*, was afterwards confirmed by Sir L. Shadwell, V. C. See 10 Sim. 150.

In *Hole v. Estcot*, 4 My. & Cr. 187, by a marriage settlement, an estate was limited to the husband for life, and after providing a jointure for his wife, a power was given to the husband and wife, or the survivor of them, to appoint to the children of the marriage, and in default of appointment the estate was limited to such sons and daughters, or such children of deceased sons and daughters of the marriage as *should be living at the death of the survivor of the husband and wife*, with an ultimate remainder to the husband in fee. The husband became bankrupt, and *afterwards* he and his wife made a joint appointment in favour of two of the children of the marriage. The husband then died, and a bill having been subsequently filed by a person claiming under the bankruptcy, for an account of the rents and profits of the settled estate, the wife thereupon executed a separate appointment in favour of the same children. It was held by Lord Cottenham, C., that as the husband was entitled to a life interest, with remainder to himself in fee, in consequence of the estate limited to the children failing for want of a particular estate to support it, and as the interest of the husband, unaffected by any execution of the power, passed to the assignees, he could not by any subsequent joint appointment with his wife deprive them of it. But his Lordship (on this point reversing the decision of the Master of the Rolls, reported 2 Keen, 444) held that the appointment of the wife surviving was good as against the assignees.

But as the destruction as well as the creation and execution of powers depends upon the substantial intention and purpose of the parties, a conveyance, by a tenant for life having powers of sale, or powers of leasing in possession, by way of mortgage or to secure an annuity (although a contrary opinion seems formerly to have been entertained, *Vincent v. Ennys*, 3 Vin. Abr. 432, pl. 10; and *Corker v. Ennys*, Ib.), will not extinguish the powers of sale and exchange (*Tyrell v. Marsh*, 3 Bing. 31; 10 Moo. 305; *Davies v. Bush*, M'Clell. & Y. 58; *Corvill v. Lord Oxmantown*, 3 Y. & C. Exch. Ca. 369), or the powers of leasing; see *Ren v. Bulheley*, Doug. 291, in which case Lord Onslow, being tenant for life of an estate with power to grant leases in possession for twenty-one years at the best rent, conveyed his life estate to trustees to pay an annuity during his life, and the surplus to himself. It was held by Lord Mansfield, C. J., that the power was not thereby extinguished, but that Lord Onslow might still grant a lease according to

the terms thereof. "The creation, execution, and destruction of powers," said Lord Mansfield, "depend on the substantial intention and purpose of the parties. It is said—1. That the grantor in this case, was not in possession, and that it was necessary he should be, to execute the power. But I think possession here means the receipt of the rents and profits, which were applied to his use. If *actual* possession were necessary, a leasing power could never be executed where the land is in the hands of a tenant. 2. It is contended, that by granting away his life estate, he extinguished the power. Certainly, where the whole life estate is conveyed away by *the intention* of the parties, the power must be at an end, and cannot be afterwards exercised to the prejudice of the grantee. But the conveyance here was only to let in a particular change, subject to which the rents and profits still belonged to Lord Onslow; and the lease could not prejudice the security, nor the remainderman, for the best rent must be reserved. It would therefore be contrary to the intention of all the parties, to hold that the power was extinguished."

A fortiori the power of leasing would not be extinguished by a conveyance by way of mortgage or security, where in the mortgage deed or security there is a reservation of the power of leasing; see *Long v. Rankin*, Sugd. Pow. App. No. 2. Lord Eldon, however, in that case, which came before the House of Lords, desired, that it might not be understood that he had given any opinion whatever, with regard to *Ren v. Bulkeley*.

In *Warburton v. Farn*, 16 Sim. 625, the trustees of a marriage settlement had power to invest the trust funds in land, and afterwards to resell the lands *with the consent of the tenant for life*. After the trustees had invested part of the funds in land, the tenant for life conveyed his interest under the settlement, to a purchaser, by the description of all his life and other estate and interest in all the monies, stocks, funds and securities, and messuages, tenements and hereditaments, into which the money, stocks, funds and securities were, or *at any time thereafter might be, converted and changed*. It was held by Sir L. Shadwell, V. C., that the power of the tenant for life to consent to a resale of the lands was not destroyed by the alienation of his life interest. "For," said his Honor, "the conveyance of that interest to the purchaser shows, that the contract between him and the purchaser was that the property which was the subject of the contract should retain its convertible quality; which it could not do unless the tenant for life retained his power of consenting to an exercise of the power of sale by the trustees."

2. As to Powers in Gross.

Powers in gross are powers given to a person who had an interest in an estate at the execution of the deed creating the power, or to whom an interest is given as well as a power, but he is only thereby authorized to create estates, which will not take effect out of his own interest. To use the words of Hale, C. B., in the principal case, "where the power does not fall within

the estate, as where a tenant for life has a power to make an estate which is not to begin till after his own estate determines, such power is not appendant or annexed to the land, but is a power in gross, because the estate for life has no concern in it." Ante, 283.

Amongst powers in gross may be mentioned, a power to a tenant for life, to appoint the estate *after his death* amongst his children; a power to jointure his wife *after his death*; a power to raise a term of years to commence *from his death*, for securing younger children's portions. 1 Sugd. Pow. 44.

A reservation also of a power to himself, by a person seised in fee, who settles his estates on others (Ib.), or a power given to a stranger to charge an estate for *his own benefit* (Ib.), will also be powers in gross.

Whether Powers in Gross can be suspended.

It was decided in the principal case of *Edwards v. Slater*, that a power in gross, viz. the power of leasing for thirty-one years *after* the death of the donee, was not suspended, "for the donee," observes Hall, C. B., "had a right to make such lease, which was sufficient to support the power."

Whether Powers in Gross can be extinguished.

An assignment of totum statum suum, or other alteration of an estate for life, will not, as is laid down in the principal case of *Edwards v. Slater*, affect a power in gross. Thus, if a tenant for life, as in the last-mentioned case (and see *Jenkins v. Kemis*, 1 Ch. Ca. 103), or a tenant for years (*Savile v. Blaket*, 1 P. Wms. 777), either assigns such interest, or assumes to pass the fee, in former times, if the conveyance were of that character which would only pass what interest the party conveying actually had, as a covenant to stand seised, a lease or release (*Scrope v. Offley*, 1 Bro. P. C. 267, Tom. Ed.; *Phitton's Case*, cited ante, p. 280), or a bargain and sale (*Jenkins v. Kemis*, 1 Ch. Ca. 103); and at the present time, even if the conveyance were by feoffment, as it has ceased to have a tortious character (8 & 9 Vict. c. 106, s. 4), he will not thereby extinguish any power in gross, such as a power of leasing from the time of his decease, as in the principal case, or of jointuring, or of charging portions (*Savile v. Blaket*, 1 P. Wms. 777; 1 Sugd. Pow. 83); because as the donee has merely conveyed away his own interest, and the appointment is not to take effect until after the termination thereof, he does not by the execution of the power in any way derogate from his own grant.

And, although a different opinion seems to have been entertained (*Snape v. Turton*, 2 Roll. Abr. 263, pl. 2; *Clarke v. Philips*, 1 Vent. 42; *Herring v. Brown*, Carth. 24), it seems now to be clear as is laid down in the principal case, that a tenant for life, with power to appoint the reversion, or a tenant for life with remainders over, with a power of revocation, can, although he may have aliened his life interest, still exercise his power. See also *Savile v. Blaket*, 1 P. Wms. 777; 1 Pow. 86, 87, 88.

Effect of Tortious Conveyances on Powers Appendant and in Gross.

Conveyances by a tenant for life, donee of a power which formerly had a tortious operation, such as a fine, recovery and feoffment, would in general extinguish powers both appendant and in gross (*Albany's Case*, 1 Co. 111; 4 Leon. 133, 219; *Bickley v. Guest*, 1 Russ. & My. 440; *King v. Melling*, 1 Vent. 225; *Savile v. Blakel*, 1 P. Wms. 777; *Bird v. Christopher*, Sty. 389; and see *Stewart v. Marquis of Donegal*, 2 J. & L. 636); but if part of the land only were comprised in the conveyance, the power would remain, as to the rest (*Digges's Case*, 1 Co. 157 a; and see Mo. 618); though, as is laid down in the principal case, the acceptance of a feoffment would not destroy a power in gross. Ante, p. 285.

In some cases a feoffment or fine would not extinguish a power, as where a fine was levied after the execution of the power (*Thomlinson v. Dighton*, 10 Mod. 71; *Bullock v. Thorne*, Mo. 615; *Ingram v. Parker*, T. Raym. 230 cited; 1 Vent. 280, 291; and see *The Earl and Countess of Jersey v. Deane*, 5 B. & Ald. 569); and where a tenant for life, having power to lease for life, made a lease by feoffment, it was good, because by the deed the lease took effect, and so the livery came too late (1 Vent. 291). And a deed and a fine have together been held a valid execution of a power. *Earl of Leicester's Case*, 1 Vent. 278; *S. C. nom. Wigson v. Garret*, 2 Lev. 149; T. Raym. 239.

These questions will seldom now arise, as fines and recoveries have been some time since abolished (3 & 4 Will. 4, c. 74); and feoffments no longer have a tortious operation (8 & 9 Vict. c. 106, s. 4), so that they only now operate in the same way as a release or a bargain and sale.

Extinguishment of Powers Appendant and Powers in Gross, by Release.

Having considered how far powers of various kinds may be either suspended or extinguished, by any act of the donee or others with respect to the property, we may now consider how far they are capable of being suspended or extinguished by a release.

It has long since been decided, that powers *simply collateral*, that is to say powers given to a stranger, who has no interest in the land, cannot be released, where they are to be exercised for the benefit of another. *West v. Berney*, 1 Russ. & My. 434.

With regard to powers *not simply collateral*, viz. powers appendant and in gross, it is clear upon principle they may be either defeasanced or released; for a power of this kind not being a trust, it is optional with the donee, whether he execute it or not, and if he were to be allowed to exercise it, after a release to the person taking the estate subject thereto, he would be derogating from his own grant. And this is fully borne out by the authorities; for it is laid down in a well-known case, that a present power may be extinguished by release, to any one who has an estate of freehold in the

land, in possession, reversion or remainder, and the estate defeasible by the power is thereby made absolute. See *Albany's Case*, 1 Co. 113 a. A full execution of a power will amount to a release (1 Atk. 567), but the intention to execute fully must be clear. *Zouch v. Woolston*, 2 Burr 1136; *Earl of Uxbridge v. Bayley*, 1 Ves. jun. 499; *Hervey v. Hervey*, 1 Atk. 561.

So a future or executory power may be released. Thus where a man entitled to a life interest in an estate, with remainder to another in tail, with remainders over, had a power of revocation and new appointment, and he afterwards released his power to a feoffee and the remainderman; it was held by the Court of King's Bench, that the future power was thereby extinguished. *Albany's Case*, 1 Co. 110 b.

Although there appears to have been some doubt upon the subject (*Digges's Case*, Mo. 605), it seems to be settled at the present day, that a power may be *partially* released; as, for instance, a person having a power of revocation may release it so far, as not to be able to exercise it, without the consent of a particular person (*Leigh v. Winter*, 1 Sir W. Jones, 411; *Earl of Tankerville v. Coke*, Mose. 146). And the donee of a power, though it is to be executed only by will, may bind himself not to execute it, or not to do so, except under certain restrictions. In *re Chambers*, 11 Ir. Eq. Rep. 518.

Upon the same principle, a power to a tenant for life to appoint an estate among his children, or to charge it with portions may be released. And upon this subject, in the case of *West v. Berney*, 1 Russ. & My. 434, Sir John Leach, after an elaborate examination of the authorities, made the following important observation:—"It is clear," said his Honor, "that a power may be released, where it is for the donee's benefit, as a power to charge a sum of money for himself. In such case, his joining in a conveyance of the land, clear of the charge, would be a release.

"I think that every power reserved by the grantor, whether he has retained an interest in the estate as tenant for life or otherwise, is an interest in him, which may be released or extinguished (*Bird v. Christopher*, Sty. 389). It differs altogether from a naked authority given to a mere stranger. It is so much reserved over of the estate.

"I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate, and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross, in a tenant for life, would not be defeated by a conveyance of his life estate; as power appendant a leasing power would be defeated; because the conveyance of his life estate is not inconsistent with the exercise of his power. . . .

"Mr. Preston admits all this reasoning as applied to general powers, but

disputes it as to powers to appoint to particular objects, as children. Here, he says, the power is not an interest in the appointor, but in the appointee, and is therefore in the nature of a trust, which the trustee cannot release or extinguish.

"It is not a trust, because the alleged cestui que trust cannot call for the execution of it. It may be exercised or not; and a dealing with the estate, inconsistent with the exercise of it, determines the option to exercise it. In *King v. Melling*, 1 Vent. 225, was a particular power.

"But this reasoning would apply to a power simply collateral. The difference, however, is, that no act in the latter case can affect the land; whereas in the other, the interest of the person gives him the power to create an inconsistent estate in the land, though defeasible."

It was not, however, necessary for his Honor to decide the point in *West v. Berney*, but the reasoning has since been followed out in several cases. Thus in *Horner v. Swann*, T. & R. 430, a testator gave real property to trustees, upon trust for his wife for life, with a power of appointment among their children. It was held by Sir J. Plumer, M. R., that the widow could release or extinguish her power. See also *Smith v. Death*, 5 Madd. 371; *Bickley v. Guest*, 1 Russ. & My. 440.

So where a tenant for life, having a power to charge the estate with portions for younger children, mortgaged his life estate, and covenanted not to exercise the power, it was held by Sir J. Romilly, M. R., that he could not afterwards charge the estate with portions to the prejudice of his mortgagees. *Hurst v. Hurst*, 16 Beav. 372.

So where a sum of stock was held in trust for a lady for life, "then for any husband," in case she should appoint to him, and subject thereto in trust for her children, and in default of children to such uses as she should appoint. The lady, at the age of sixty-eight, having never married, appointed the fund to herself, and released the power of appointment in favour of her husband and children. It was held by Sir L. Shadwell, V. C., that she was entitled to a transfer of the capital. *Miles v. Knight*, 17 L. J. (N. S.) Ch. 458; 12 Jur. 666.

But no effect will be given to a release of a power by a father, so as to vest property in himself, which was intended for his children; or in other words, a power given for particular purpose, will not be allowed by a fraudulent circuitry to be exercised for a different purpose. Thus in *Cuninghame v. Thurlow*, 1 Russ. & My. 436, where a fund was limited to a father for life, with remainder to his children, in such shares as he should appoint, and in default of appointment, to the children equally, the father released the power as to a portion of the fund, so as to vest a share of it in himself as executor of a deceased son, who, in default of appointment, took a vested interest. Sir L. Shadwell, V. C., although he was of opinion that the power was extinguished by the release, nevertheless decided, that the Court ought not to give present effect to the release, so far as it operated to vest a share of the fund in the father, who was the donee of the power.

Formerly, a married woman could only release or extinguish a power by fine or recovery, but now she may do so under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), by deed acknowledged, in which her husband concurs (s. 77); and by the 78th section it is enacted, "that the powers of disposition given to a married woman by the act shall not interfere with any power which, independently of the act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under the act she may be prevented from doing so, in consequence of such power having been suspended or extinguished by such disposition."

ALEXANDER v. ALEXANDER.

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July 17, 1755.

[REPORTED 2 VES. 640.]

EXCESSIVE EXECUTION OF POWERS.]—*A widow, having power to appoint 6,000l. among her children, by will appoints 100l. to her daughter A., one-fourth of the residue to her daughter M., one-fourth to her son J., for their own respective use, and she gave the remaining two-fourths to M. and J., upon trust, as to one-fourth part to place it on securities during the life of another daughter, C. (a married woman), and pay the interest to her for her separate use, and at her decease upon trust for her children, as she should by writing in the nature of a will or otherwise appoint, and in default of appointment, to her children equally ; if there were no children, such one-fourth, if C. survived her husband, to be paid to her for her only use ; but if C. died in the life of her husband, at her decease one-third of the one-fourth to go to J., and another one-third to M., and the remaining one-third, together with the remaining one-fourth part, was to be in trust to be applied as M. and J. should think most beneficial for the personal support and maintenance of the testatrix's son F. his wife and children, but not for payment of his debts.*

Held, that the appointment of 100l. to A., of the two-fourths to J. and M. absolutely, and of a life interest to C. for her separate use was good, but that the provision for her children was bad, the power not warranting an appointment to grandchildren, though a settlement might have been made on the marriage of C., by which such provision might have been made.

Held, also, that if C. left children at her death, the limitations over of her fourth would be void, and it would fall into the residue.

Held, also, that the limitation of the one-fourth in trust for F. his wife and children was a valid appointment to A. absolutely (sed quare), and that the proviso, by which what F. took was not to be liable to his debts, was void.

A power may be good and bad in part, and the excess only void, where the execution is complete, and the bounds between it and the excess clear.

JAMES ALEXANDER by will bequeaths to two trustees 6,000*l.*, describing particularly the funds of which it consisted, upon trust to pay the interest and produce to his wife for life, and directs them to place the same out at interest with her consent; "and I give unto my said wife the absolute disposal of the said sum of 6,000*l.* unto and among *such children* begotten between us, and in such proportion as she shall by last will and testament, or by any other deed or deeds, writing or writings, to be executed by her in her lifetime, attested by two or more credible witnesses, direct, limit and appoint;" he then directs the trustees to pay the same according to such will or appointment; and for want of such a will or appointment that the said 6,000*l.* should fall into and go in the same manner as the residue of his personal estate; but if his wife should think fit to apply in her lifetime any part of the said 6,000*l.* as an increase of another of the portions given by the will to his said children, or any of them, for their better advancement in marriage or otherwise in the world, then the trustees should, out of the said 6,000*l.*, issue and pay such part thereof for the benefit of such children as his wife should by any writing as aforesaid direct and appoint.

The mother makes her will, there being then five of the children living, she thereby recites her power, and in pursuance thereof gives to her daughter *Anne* 100*l.*, to be paid out of the sum of 5,390*l.*, which she computed to be the only remaining sum of 6,000*l.*, after deducting what she had before paid to some of her children; and as to the remaining produce, after payment of the said 100*l.*, she disposes to her daughter *Mary* and son *James*, for their own respective use, each one full fourth part thereof, (the whole into four parts equally to be divided,) and to the said *Mary* and *James* also the other remaining two fourth parts; but as to those two fourth parts upon the trusts following, viz. as to one of the same to place out or continue on securities during the life of their sister, her daughter *Catherine*, wife of *Thomas Clipperton*, and to pay the interest thereof to such person or persons and for such purposes as she shall from time to time direct, and in default of such direction into her own proper hands, my will being that such interest shall be for her separate use and disposal, and not subject to the debts, control or engagements of her present or any future husband; and

upon trust at her decease to pay and apply the principal of such fourth part to *such child or children*, if any, as she shall happen to have living at her decease, in such manner as she shall by writing under her hand in nature of a will or otherwise appoint; and, for want of such appointment, to such child, if but one, if more, to them equally; in default of such child or children the principal of such fourth part, if she survives her husband, to be wholly paid to her for her only use and benefit; but if she dies in his life the said principal at her decease to go to the said *James* and *Mary*, yet for their own respective benefit only as for one third part thereof to each of them; and as to the other third part thereof, and also as to the other of such remaining two fourth parts, whereof no disposition is herein yet made, upon trust to pay and apply the principal and interest thereof, or any part of either, from time to time, weekly or otherwise, in such manner as said *Mary* and *James*, their executors, administrators or assigns shall in their discretion think most beneficial for the personal support and maintenance of their brother, my son Francis, and his wife and children, but not for the payment of his debts.

Sir *Thomas Clarke*, M. R., said, there were some particularities in the case, and he would consider it, and the next day delivered his opinion.

Considering the nature of the power, the wife was confined as to the objects to give it to, but left to her discretion as to apportioning it among them. In consequence of this she was obliged to give the whole among the children,—every child must have some,—such share as she pleased, provided it were not illusory (a); which has been the language of the Court as to such appointments. If then she might apportion as she pleased, it is necessarily implied in that, that she might apportion it out in such manner as she pleased; for it is such kind of proportions, as she should think fit; and therefore the power in the first part of the will does not differ from the latter part, where the word *manner* is added; for the first word means kind of proportions. This is the nature of the power (b); consequently, she might give an interest for life in a particular share to one child, or limit the capital of the same share to another, or even go so far as to limit it to a third child upon a contingency; provided she doled out the whole in these various ways among all the children only. One restriction she was under, that she could not have given any one child merely a reversionary interest (c); for

(a) See now 1 Will. 4, c. 46; and 1 L. Cas. Eq. 267.

(b) 2 Brown, 22.

(c) 1 Brown, 450.

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it was intended as a provision, and therefore it would be deemed illusory. The power did not require that she should dole it out in gross sums, and give each child an absolute interest in that gross sum ; for which, among several other cases, *Thwaytes v. Dye*, 2 Vern. 80, is a strong authority that such a power will enable the giving particular interests, and to apportion such interest as a general power of apportioning land itself would. As this is necessarily implied, there is nothing in the objection, that where this is designed the power is more extensive, and words added.

As this is the nature of the power, consider what is done under it. It is observable, that in consequence of the nature of the power, the mother has given to each of the five children then alive a share in possession, not merely a reversionary interest, which I should have doubted whether it would be good. The 100*l.* to *Anne*, and the one-fourth of the residue to *James*, and the other fourth to *Mary* absolutely, are undoubtedly good ; so is the interest to *Catherine* for life in the other fourth part ; and the giving it to her separate use is so far from being an objection, that it is more strictly carrying into execution the will of the father, a stronger execution of the power agreeably to his intent.

But next the provision for the children of *Catherine* is not a good appointment. The mother had a power to do something similar to this, but in another way ; for though that power would have enabled her, for better advancement in marriage, to make a strict settlement, that is implicitly contained in that power to limit any share she thought fit to give for advancement of marriage, in that way ; but she has not taken that method, for she has made a disposition of it by her will, and therefore it must correspond with every circumstance in that will. No case will, under a power (c) to appoint to children, warrant a gift to grandchildren : there is a case in point to that, if it needed it, in *Vernon* ; but it clearly cannot. *Thwaytes v. Dye* (2 Vern. 80) is more like an authority on that side of the question ; but that is no authority to contradict the reason of the thing, that the appointment to the children is bad.

Next, as to the contingent interest to *Catherine* if she had no children and she survived her husband ; but, in default thereof, two-thirds to *James* and *Mary* ; the other third to go over with the other fourth to *Francis* : suppose *Catherine* leaves children at the time of her death, it is im-

(c) Though an appointment to grandchildren under such a power is void, yet it ought to prevail so far as the power ex-

tends. Cowper, 637 ; 2 Brown, 30, 54, where Sir Lloyd Kenyon, M. R., held, that the excess only was void. 3 Burr. 1626.

possible any of these limitations over should take effect; it will fall into the residue, because it was no appointment, being only a partial appointment of that fourth, given only to *Catherine* for life; and the children though they could not take themselves, would yet prevent the limitation over.

But the most material limitation is that given last to *Francis*, his wife and children. Consider the effect of this appointment;—first on a supposition that this discretionary power was good, and had been exercised by *James* and *Mary*. It is clear they could not have duly exercised that power without giving a share to the wife and children of *Francis*; otherwise it is not consistent with the mother's intent; nor can I say they could discreetly have given the whole to *Francis*; and it is clear, that if they had exercised this power to the wife and children, it would have been bad. If they had given anything (as they must something in consequence of their power), it would have been giving so much contrary to the intent and effect of the power; but I am clearly of opinion this discretionary power was not good; because, if there is a power to A. of personal trust or confidence, to exercise his judgment and discretion, A. cannot say this money shall be appointed by the discretion of B., for *delegatus non potest delegare*. It was determined by the Lord Chancellor (Lord Hardwicke) in *Attorney v. Berryman*, Feb. 11, 1752, where a personal estate was given to such charitable use as one Dr. *Berryman* should appoint; he directed the money to be applied as another Dr. *Berryman*, his brother, should appoint, which the Court would not allow. Next consider the consequence of this; if the power could not be exercised, will it devolve on the Court? It clearly cannot (*d*); for powers devolving on the Court are powers well created in the original; but such as by accident (*e*), as the death of persons, cannot be executed by those persons; there is a natural substitution of the Court in the room of those persons. But if a power is void in the original, there is nothing to devolve on the Court. It is the same as if the mother had given it herself indefinitely for the benefit of *Francis*, his wife and children, laying the discretionary power out of the case, as if never inserted in the will; and certainly, so far as the wife and children were to have the benefit of it, that would not be good. Nobody could say how much the wife and children were entitled to, because it is given

(*d*) 1 Ves. 60.

(*e*) In such case the Court must be governed by the Statute of Distributions.

Per Lord Mansfield, Durnf. & East, 438, n.;
1 Brown, 451.

indefinitely. Had it been free from that circumstance of uncertainty, how much each was to take, it would be void as to the wife and children just as that given to *Catherine*. Suppose she had given it to the husband, his wife and children, in gross sums absolutely, equally to be divided, that would have been bad and an excess of her power; and if it had been such a partial appointment, so far as void, it would have fallen into the residue. The material question then is as to the consequence of this, whether the wife and children being incapable of taking, will carry the whole to *Francis*, or whether any *medium* can be found out, it is said, to carry the whole to *Francis*; because the execution of a power may be good in part and bad in part; and that even at law an irregular execution of a power will be supported, and not amount to no execution at all (*f*); and that in many cases only the excess of a power will be void, the residue good. All that I admit; first, that the execution of a power may be good and bad in part; but the consequences of this will be various, as the circumstances of the cases are; as suppose a power to a man to appoint 1,000*l.* among his children; he appoints 100*l.* among the children, and 900*l.* among others who are strangers, the appointment of the 900*l.* will be so absolutely void, as that it will not be prevented from going over, if limited over for want of appointment, as if he had made none; and something of this has happened in this case, or may happen, as to *Catherine*. On the other hand, if the father gives the whole 1,000*l.* to his children, and annexes a condition that they shall release a debt owing to them, or pay money over, the appointment of 1,000*l.* would be absolute, and the condition would be only void; and the boundaries between the excess and proper execution are precise and apparent. The ground and principle of all this is, that where there is a complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, where the boundaries between the excess and execution are not distinguishable, it will be bad. Suppose one has power to jointure a wife for life, and appoints to her for ninety-nine years, if she so long live, as in the case of *Mr. Newport*, at law it was held in B. R. to be void, but in equity good *pro tanto*; because he has done less than his power, and it clearly appears how much less the boundaries are clear and distinguishable. If the wife should outlive the ninety-nine years, the estate, as to the residue of her life, will be undisposed of, and will go over to the

remainderman or other person entitled. Now to put a case *vice versá*, suppose a person has power to lease for twenty-one years, and he leases for forty, that shall be good for the twenty-one, because it is a complete execution of the power, and it appears how much he has exceeded it. If the Court can see the boundaries, it will be good for the execution of the power, and void as to the excess. Now is this appointment for the benefit of *Francis*, his wife and children, a complete execution as to *Francis*? (for that is contended for). I think certainly not; for the wife and children were to have something, and so far as something is designed for them it is bad, and there is no possibility of distinguishing how much she has exceeded the power; it falls, therefore, within neither of those circumstances, which are essentially necessary. But it is proper to consider if there is no other way to make this good; because the Court will strongly lean in favour of that side if it can. I own I incline to think there is a method. Suppose the mother, instead of using the words she has, had given this one-fourth to be applied in such way as was most beneficial for her son and his wife and children, if they shall by law be capable, I should not have doubted, but that as the wife and children are not by law capable, it would be absolute to *Francis*; and the question is, whether there is any difference. This bears an analogy to what the dispositions by the mother would be if she had given it to a son by name who never appeared to have existence, or was never capable of taking; if given to these four indefinitely, and three were incapable of taking, the fourth would have the whole, must take such, as the others were incapable of taking. It falls within the reason of the late case of *Humphrey v. Taylour*, where a personal estate was given to two in joint-tenancy, one was outlawed, and, therefore, the testatrix made a codicil, whereby she adeemed what was given to one of the two; the question was, whether the other joint-tenant should take only a moiety, but the Court held, he was to take what the other did not. They were to take the whole between them, the mother never designed this fourth part should fall into the residue, and it would be extremely hard that it should. Then he [*Francis*] will be entitled to the whole of that. As to the subsequent restraint, that it should be exempt from debts, she has there exceeded the power given by the law, as in the other case she exceeded the power given by her husband; for it will be left to take the fate of being his property, and subject to be come at as his creditors shall think fit.

I declare, therefore, that the execution of the power, so far as it

concerns other persons than the children of the testator, is void and of no effect.

Note.—At the bar was cited the case of *Lord Conway*, who, having power to grant leases of his estate by one instrument, granted several, some of which were not within the power; and though all were within the same instrument, they were considered as several leases, and it was sent to the Master to separate them.

Also *The Dean and Chapter of St. Paul's Case*, to show that where a power exceeded is void at law in the whole, this Court will hold it good as an agreement, and direct a specific performance, restraining the contract according to the power, as was done there.

Alexander v. Alexander is usually cited as a leading authority, when the question is discussed, whether there has been an excessive execution of a power and the effects thereof. The principle upon which Courts deal with excessive executions of powers is well laid down there by Sir Thomas Clarke, M. R., viz.—that “where there is complete execution of a power, and something *ex abundanti* added, which is improper, there the execution shall be good, and only the excess void; but where there is not a complete execution of a power, and the boundaries between the excess and execution are not distinguishable, it will be bad.” Ante, p. 304; and see 2 Sugd. Pow. 80.

An execution of a power may be excessive; first, when objects are included not intended by the power; secondly, in the amount or quantity of the subject-matter of the appointment; thirdly, by the imposition of conditions not authorized by the power.

I. *As to an Excessive Execution of a Power with regard to its Objects.*

Where a person has power to appoint to certain objects, it is clear that he will not be able to appoint to others. Thus, for instance, as was decided in the principal case, a power to appoint to children will not authorize a gift to grandchildren. *Bristow v. Warde*, 2 Ves. jun. 336; *Butcher v. Butcher*, 1 V. & B. 79; *Palmer v. Wheeler*, 2 Ball & B. 27. So likewise in *Waring v. Lee*, 8 Beav. 247, where a testator gave his widow power by deed or will to appoint “to nephews and nieces, grandnephews and nieces,” it was held by Lord Langdale, M. R., that she was not authorized to make an appointment to a grandniece for life, with remainder to her children. “Is there,” said his Lordship, “any indication in the

present case of including the children of grandnephews and nieces in the expressions 'grandnephews and nieces?' I think there is none. In the absence of such indication, and the power not literally extending to make the grandchildren objects of the power, I must hold that the appointment in favour of the children of the grandnieces is invalid." See *Hewitt v. Lord Dacre*, 2 Keen, 622.

Where, however, the donor of the power uses the words children and grandchildren indiscriminately, the Court, upon a slight indication of intention, extends the word beyond its strict limits. Such was the case of *Hussey v. Dillon* (Amb. 603; S. C. nom. *Hussey v. Berheley*, 2 Eden, 196), in which a *great-grandchild* had been described as a grandchild, and the case of *James v. Smith* (14 Sim. 216), in which the expressions "nephew" and "children of nephews" had been used convertibly. Per Lord Langdale, M. R., in *Waring v. Lee*, 8 Beav. 249.

In *Kennerley v. Kennerley*, 10 Hare, 160, a testator had bequeathed his property to his wife to bring up and educate his children, and when they should come of age, to settle on them what she should deem prudent, reserving to herself a sufficient maintenance; and at her death, the property remaining to be equally divided amongst his children; with a gift to trustees in case the widow should marry again. It was held by Sir George Turner, V. C., that the widow took a life interest in the property, with a power to settle or appoint the same on or to the children of the testator, but not on or to his grandchildren; and that the children took vested interests in the property at the testator's death, liable to be divested by such appointment.

Where there has been an excess in the execution of a power, by giving a share or partial interest to a stranger, if the excess in the execution of the power for the benefit of the stranger is clearly distinguishable from the benefits provided for the objects of the power, the latter will be valid. Thus if a man have power to appoint 1,000*l.* among his children, and he appoints 100*l.* among his children, and 900*l.* among others who are strangers; the appointment of the 100*l.* will be valid, but that of the 900*l.* will be absolutely void, so that it will not be prevented from going over, if limited over for want of appointment, as if he had made none. See ante, p. 304.

So in *Sadler v. Pratt*, 5 Sim. 632, where E. having four children by her first husband, and three by her second, and having a power to appoint a fund amongst the former only, appointed it amongst *all* her children equally, and declared that if her children by her first husband should refuse to share the fund with her other children the whole fund should go to her youngest child by her first husband. It was held by Sir L. Shadwell, V. C., that the first class of children took each one-seventh of the fund under the appointment, and that the appointment to the children of the second marriage being void the shares given to them went as in default of appointment.

So likewise in *Crozier v. Crozier*, 2 C. & L. 294; S. C. 3 D. & War. 373, where upon the marriage of A. certain lands were by settlement con-

veyed to A. for life, and after his decease to such of his children as he should by deed or will appoint, and to their heirs and assigns, and for default of appointment to such children equally. A. having several children devised these lands to his wife for her life, upon condition that she should support, maintain and educate the children, and after her decease to A.'s son John. It was held by Lord Chancellor Sugden, that the gift to the wife was void, but that the trusts in favour of the children were valid, and that the gift to the son was good, the execution of the power being void only for the excess and not in toto. See also *Harvey v. Stracey*, 1 Drew. 73.

If partial interests are given to persons who are, with remainders over to persons who are not, objects of the power, the remainders over only will be void, and the objects of the power will take the partial interests conferred upon them (*Brudenell v. Elwes*, 1 East, 442; 7 Ves. 382; 2 T. R. 254; *Routledge v. Dorril*, 2 Ves. jun. 357; *Smith v. Lord Camelford*, 1b. 698; *Crompe v. Barron*, 4 Ves. 681); nor is it any reason for setting aside the whole appointment that the donee of the power would not have made such an appointment could he have foreseen that any inequality would have arisen from a failure of a part of the appointment. *Bristow v. Ward*, 2 Ves. jun. 336, 350.

In one of the points determined in *Alexander v. Alexander*, the donee who had power to appoint a sum of money among her children, gave one part thereof "upon trust to pay and apply the principal and interest thereof, or any part of either, from time to time, weekly or otherwise, in such manner as the trustees, their executors, administrators or assigns, should in their discretion think most beneficial for the personal support and maintenance of her son Francis, and his wife and children, but not for payment of his debts." It was held by Sir Thomas Clarke, M.R., as the wife and children were not by law capable of taking, Francis was entitled to the whole absolutely. It is, however, doubtful whether the decision upon this part of the case is right, as it seems scarcely possible to separate the gift to the husband from that to his wife and children. See 2 Sugd. Pow. 69.

It is clear, however, that where a power is executed in favour of persons, some of whom cannot take, in consequence of the rule against perpetuities, the appointment will be altogether void, even with regard to those who might legally have taken, had the gifts been confined to them. See *Gee v. Audley*, 2 Ves. jun. 365, cited; 1 Cox, 324; *Routledge v. Dorril*, 2 Ves. jun. 357; *Harvey v. Stracey*, 1 Drew. 73.

A restriction, however, in an appointment, which would render it invalid as being beyond the limit allowed by the rule against perpetuities, will sometimes be rejected so as to render the appointment valid. Thus in *Fry v. Capper*, Kay, 163, where a widow, having, under a settlement made previous to her marriage, a general power of appointment over a trust fund among her children, by will made an appointment amongst her six daughters equally, but directed that as to the shares of two of her daughters who were married the trustees should stand possessed thereof, upon trust during the joint lives of her said two daughters respectively,

and their respective husbands, to pay to them, *but not by way of anticipation*, the interest, dividends and annual produce of their respective shares for their separate use, without being liable to the debts or control of their husbands or husband respectively, and after the decease of her daughters respectively the will declared the trusts of their respective shares to be for their respective appointees by deed or will, and, in default, for their executors or administrators respectively. It was held by Sir W. Page Wood, V. C., that such an appointment was not void as fettering the property beyond the legal limits, as the restraint upon anticipation might be rejected, and the rest of the appointment sustained. "In the case," said his Honor, "of an appointment under a power, the Court looks to the scope and intent of the power; and, in appointments by will (*Brudenell v. Elves*, 1 East, 451) of real estate (*Routledge v. Dorril*, 2 Ves. jun. 364), has, by the doctrine of *cy près*, given effect to them against the very words of the instrument, and has enabled grandchildren, who were not objects of the power, to take under a limitation to a child for life, with remainder to the children of such child, by treating the first taker as a tenant in tail; and because the words of the appointment would otherwise have been wholly inoperative, the Court has thus given effect to it in the mode in which it can take effect legally (*Pitt v. Jackson*, 2 Bro. C. C. 51). Therefore, in an instrument made in execution of a power of appointing among children only, if the Court finds an appointment of a share to one child, with a direction that such share shall be dealt with in this way, the Court may reject that part of the limitation which exceeds the legal limits. According to *Bray v. Hammersley*, (3 Sim. 513, affirmed in D. P. nom. *Bray v. Bree*, 2 C. & F. 453,) this is in other respects a good appointment to the children who are objects of the power; but if the restriction be not rejected it is said that it will make the whole void. Rather than decide that, the Court will reject the limitation, and thus leave the rest of the appointment valid. In the words of Lord Mansfield, in *Chapman v. Brown* (3 Burr. 1626), 'Where there is a limitation for life to a person unborn, with remainder in tail to the first and other sons, as they cannot take as purchasers but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life.' And by analogy to this *cy près* doctrine, although the donee of the power cannot appoint to grandchildren nor to persons unborn in the manner in which he has attempted to limit the property, yet the Court will so modify the limitation as to make it effective in the manner in which it may take effect according to the power. The argument on this point, in *Thornton v. Bright* (2 My. & Cr. 230), suggests the decision to which the Court would probably come, that, if necessary, the Court would reject this limitation, and treat the appointment as being a settlement for the benefit of the daughter, without the restraint upon anticipation. The point is ingenious, and would deserve, perhaps, more consideration if it were open to me. However, if *Thornton v. Bright* had not decided the question, I think

that I should have come to the same conclusion independently of that authority." See however *Caver v. Bowles*, 2 Russ. & My. 304.

As to the difference between an appointment exceeding the limits of a power and void for the excess only, and one which being a fraud on the power is void altogether, see *Agassiz v. Squire*, 18 Beav. 431, and 1 L. Cas. Eq. 251.

Where there is an absolute appointment to an object of the power, and there is subsequently an attempt to cut it down, either by a gift to persons who are not objects, or beyond the limits of the power, the person to whom the first appointment is made will take absolutely, and the subsequent gift will be void. Thus in *Carver v. Bowles*, 2 Russ. & My. 304, where a father having power to appoint a fund amongst his children, gave it equally to be divided amongst them, and afterwards added with reference to the shares of his daughters, that so far as lawfully or equitably he might or could, he ordered that they were to be applied by his executors and trustees (by reference to former trusts) to the separate use of his daughters for life without power of anticipation, and after the decease of his daughters, upon certain trusts for their children, not being objects of the power. It was held by Sir J. Leach, M. R., that the words of the appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use, and to restrain them from anticipation or alienation.

In *Kampf v. Jones*, 2 Keen, 756, where a person having a power of appointing a fund amongst her children or other remoter issue appointed a sum to one of her children absolutely, and then attempted to limit it over to the unborn children of such child: the appointment to the grandchildren being too remote, it was held by Lord Langdale, M. R., that the prior absolute gift to the child was effectual.

So where a person having power to appoint amongst her children, after making an absolute appointment to them, attempted to cut it down by a subsequent direction in favour of their children, it was held by Sir J. Stuart, V. C., that the words in excess of the power were to be altogether rejected, and that the appointees who were objects of the power took absolutely. "In my opinion," said his Honor, "the case of *Carver v. Bowles* is decisive of this question. In that case it was held, that there being a valid appointment, and then an invalid attempt to cut down the interest given by the appointment, the appointee took absolutely. I think that case is an authority that I must follow in dealing with the present case." *Re Lord Sondes' Will*, 2 Sm. & G. 416. See also *Harvey v. Stracey*, 1 Drew. 73.

Where a person having a power to appoint to a fund delegates his power to another, and in default of appointment gives the fund among the objects of the power, it has been held, that the delegation of the power to a third person being void, the gift to the objects in default of appointment will be good. *Ingram v. Ingram*, 2 Atk. 88.

Where the power authorizes the appointment of a remainder in fee to an object of a power, and there is a gift to a stranger for life, with remainder to an object in fee, the life interest will be void, but the remainder will take effect, and the rents during the life of the stranger will go as in default of appointment. See *Crozier v. Crozier*, 3 Dru. & Warr. 353; 2 C. & L. 294; and the judgment of Lord Chancellor Sugden, where the authorities are reviewed in a most elaborate manner.

So where a father, having power to appoint a fund among his children, directed that it should not be divided amongst them until their mother's death, and that she should receive the dividends during her life, and apply the same, in the exercise of her sound discretion, for the best interest and advantage of his children, and that on her death there should be a division among the children in certain proportions, it was held by Sir L. Shadwell, V. C., that the direction that the wife was to receive the dividends during her life was void, and that the same were payable as in default of appointment. *Chester v. Chadwick*, 13 Sim. 102.

By the doctrine of *cy près*, or approximation, when the donee of a power has by will endeavoured to do that which he cannot legally do, the Courts have endeavoured, by cutting out the particular direction which is illegal, to give such estates to the parties as will carry out what is termed the general intention. Thus in *Pitt v. Jackson* (2 Bro. C. C. 51, cited 2 Ves. jun. 349), where on the marriage of A. money was by a settlement directed to be laid out in land, to be settled, after the death of the husband and wife, to the use of the children of the marriage, *subject to such powers, limitations and provisos* as A. by deed or will should appoint. A. by his will gave part of the fund to the surviving trustee of the settlement, in trust to be laid out in real estate, to be conveyed in trust for his daughter during her life for her separate use, remainder to trustees to support contingent remainders, remainder *to all and every the child and children of his daughter, as tenants in common*, with remainders over. It was held by Sir Lloyd Kenyon, M. R., that in order to effectuate the testator's general intention, the appointment ought to be considered to vest an estate tail in her.

Although the doctrine of *cy près* has been followed (*Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320; *Vanderplank v. King*, 3 Hare, 1; *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 173), the Judges have felt no disposition to extend it. Consequently it has been held not to be applicable to *personal estate*. Thus if personal estate be first given by appointment to a parent, an object of the power, then equally, or as he shall appoint, to the children who are not objects of the power, the intention of the appointor cannot be executed *cy près*, because in order to effectuate the intention the Court could only give it to the parent absolutely, and then it would not go in a course of descent, but would go to his executors, and be liable to his debts. In the case of real estate, it is true, the law enables the party to defeat the estate tail; but an act must be done by him for that purpose. If he dies without doing that act, the estate goes to his issue, but that is not the case as to personal estate. See *Routledge v. Dorril*, 2 Ves. jun. 357, 365.

Nor is the doctrine of *cy près* applicable, unless, by construction, the intention of the testator can be effectuated, by enlarging the life interest of the tenant for life into an estate tail, so as by that means to carry over the benefit to his children by descent instead of by purchase. See *Bristow v. Ward*, 2 Ves. jun. 336, in which case, by a settlement made in pursuance of articles, lands were settled to children as the father should appoint, and for want of such appointment to them as tenants in common in tail, with cross remainders in tail, remainder to the heirs of the father. The father appointed a part to his son Henry for life, and after his decease to and among any child or children of the marriage of his son Henry as he should appoint. It was contended by counsel for the widow and children of Henry, that if the appointment could not take place for the grandchildren as such, the Court would execute the intention as near as possible, by giving Henry an estate tail, according to *Pitt v. Jackson*. Lord Loughborough, however, held that the appointment, so far as regarded the donee's grandchildren, the children of Henry, was void, and ought to go as in default of appointment. "As to the consequence," said his Lordship, "of the father executing the power, by which as to certain parts he has embraced objects not within the power, if I could find means of effectuating the general purport, though not in the mode he has adopted, of extending in another way the benefit of the appointment to the grandchildren, it would be desirable in this case. The case is unfortunate as to the eldest son. It is probable, that out of regard to the eldest son and his issue, he made this disposition; but that intention must totally fail, unless by construction I can raise an estate tail in the son. The idea struck me at first; but it is impracticable. This differs materially from *Pitt v. Jackson*. Without entering into a discussion of that case, and the objections made by the Attorney-General to Lord Kenyon's decree, and supposing it to stand as a clear authority, it would not enable me to do the same thing here; for there the limitation of the will was to Mary Smith for life, remainder in tail to her children as purchasers; she being entitled under that settlement to a vested estate tail, subject to be divested by the appointment. Therefore there was not that difficulty, which is in the present case, in construing that he reduced her interest, that her children might take estates tail by purchase; and that that might be executed *cy près*, by letting the estate tail she had exist, so as to carry over the benefit to her children. Here it is a power to Henry to appoint children in such shares as he thinks fit. No estate tail is given, nor is any intention of that sort expressed; but the children would take, either by the appointment or for want of it, distributively *per capita*. Therefore that does not apply; and I am under the necessity of saying, the interests to the children of Henry cannot, in any respect, take effect either as to the land or the money."

The doctrine of *cy près* is not applicable to appointments executed by deeds. See *Brudenell v. Elves*, 1 East, 442, 451; where Lord Kenyon observed, "The doctrine of *cy près* goes to the utmost verge of the law, even in the construction of wills; and we must take care that it does not run wild. But it has never been applied to the construction of deeds. The

cases cited were questions upon wills. Perhaps no person has carried the doctrine further than I did, when Master of the Rolls, sitting for the Lord Chancellor, in the case of *Pitt v. Jackson*. That also was the case of an appointment by will; and I know that great judges entertained considerable scruples at the time concerning that decision. It went indeed to the outside of the rules of construction; yet still I do not think it was wrong." See also *S. C.* 7 Ves. 382; *Adams v. Adams*, Cowp. 651.

"The reason, or one reason," says Mr. Chance in his able work on Powers, "why the rule is not applied to final and complete limitations in deeds or instruments *inter vivos* seems to be obvious. In the creation of estates of inheritance by such limitations, the word 'heirs' at least is necessary (Co. Litt. 20 a, 9 a), before the application of the rule; therefore the word 'children,' &c., must be translated into 'heirs,' &c., which, speaking generally, would be contrary to all the rules of law." 2 Chance on Powers, 62.

Where a limitation to an object of the power is *subsequent* to and *dependent* upon a gift which is void in consequence of its being conferred upon persons not objects of the power, such limitation, as is laid down in the principal case, will be void. Thus in *Brudenell v. Elwes*, 1 East, 442, a lady, having power to revoke and limit new uses among *her children*, exercised the power and gave a life interest to her daughter, with remainder for life to her son, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male successively, with similar remainder to another son and his issue, remainder to the daughter in fee. The sons died without issue male. It was contended that the daughter took a vested remainder in fee under the appointment, inasmuch as though the execution of the power was void for the excess, viz. in the gifts to the issue of the sons, yet the subsequent limitation over to one who was an object of the power was good. Lord Kenyon, however, held that the life estate only of the daughter was good, and beyond that, the estate ought to go as in default of appointment. "The wife," said his Lordship, "had no power to appoint to the children of unborn children, but she was confined to execute her power among the children. So far, therefore, as she appointed an estate for life to the daughter with remainder for life to the son, she did well; beyond that she exceeded her power in appointing to the issue of the son, and therefore the excess is void. But it is equally clear that she did not intend that the subsequent limitation over to the daughter should be accelerated; but it was made to depend upon the intermediate limitations to the issue of her brothers, and she was not to take till their issue male was extinct. Those intermediate limitations, therefore, being void, the ultimate remainder dependent upon them must also fall. If, then, the appointments were originally bad for excess, the subsequent circumstances of the death of the brother, without having had issue, cannot make it good. The appointment must be legal at the time of its creation." See also *Robinson v. Hardcastle*, 2 T. R. 241; 2 Bro. C. C. 22, 344; *Bailey v. Lloyd*, 5 Russ. 330; by which *Doe v. Lord George Cavendish*, 4 T. R. 741, n., is overruled.

It has, however, been determined, that where a gift to an object of the power depends upon what has been termed "a contingency with a double aspect," and the contingency, which goes beyond the power, does not happen, it will not stand in the way of the person within the power, who may take under the appointment in the event which has happened. Thus in *Crompe v. Barrow*, 4 Ves. 681, where a lady having power to appoint a sum of money among her children, gave a life interest to her son, and after his decease for such wife and children as he might leave behind him; but in case he should die without having a wife or child him surviving, then, after his decease, to her daughter, an object of the power. It was held by Sir R. P. Arden, M. R., that the appointment to the son for his life was valid, that to his wife and children invalid, as not being well appointed by the terms of the power; and he declared that in case the son should die, without leaving a wife or child surviving, the same, according to the appointment, would belong to the daughter. It was suggested by counsel, that the ultimate limitation to the daughter depended upon the preceding estates given to the wife and children of the son, and must fall with them: as the will must receive its general construction from the death of the testatrix. His Honor, however, said, "I do construe the will at the death of the testatrix, and I think the ultimate appointment is good. If there is no wife or child of the son, the manner in which she has affected to execute the power never takes effect at all. I have determined in *Routledge v. Dorril*, according to *Robinson v. Hardcastle*, that if you give for life to a child, who is an object of the power, and then to the children of that child, and, in failure of issue, to a person who is an object of the power, that is void; but the distinction of this case from that is, that this limitation over to the daughter is, if the son should die without leaving a wife or child surviving. It fails, as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person, who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives:—if the son leaves no wife or children at his death, then the limitation over, being to a good object, takes effect; if he does leave a wife or children, then it cannot take effect."

A valid appointment may, however, be made to persons not objects of the power, with the concurrence of those who are objects; thus upon the marriage of a child, a parent, with power to appoint among his children, may with the consent of the child appoint to the issue of the marriage, and the appointment would be valid in equity (*ante*, p. 302; *Routledge v. Dorril*, 2 Ves. jun. 357; *Langston v. Blackmore*, Amb. 289; *West v. Berney*, 1 Russ. & My. 431; and see *White v. St. Barbe*, 1 V. & B. 399; *Wade v. Paget*, 1 Bro. C. C. 364; *sed vide Trollope v. Routledge*, 1 De G. & Sm. 662; *Salmon v. Gibbs*, 3 De G. & Sm. 343); but it seems it will not be sufficient for the child to be a party to the deed by which such appointment is made, if he do not execute or assent to it. *Brudenell v. Elwes*, 7 Ves. 382; *Tucker v. Sanger*, M'Clell. 424. And if an appointment be first made to a

child, and then a settlement by the child in consequence of an agreement with the parent before the appointment upon the child, and his children *not objects of the power*, it has been held good. *Tucker v. Tucker*, 13 Price, 607; *Cutten v. Sanger*, 2 Y. & J. 459.

And by an extension of the principles before laid down, with the consent of an object of a power, a power, instead of an absolute interest, may be given to him under which he may appoint to persons not objects of the power. Thus in *Goldsmid v. Goldsmid*, 2 Hare, 187, where trustees of a fund, under an act of parliament, having power to appoint the same to such one or more of several objects of the power as the trustees should select, by deed dated the 25th of April, 1821, appointed the fund to trustees (of whom Ann Goldsmid, one of the objects of the power, was one), upon trusts to be declared by a subsequent deed; and by that deed, to which Ann Goldsmid and all the trustees were parties, the trusts of the fund were declared to be for the benefit of Ann Goldsmid for life, with remainder in equal shares amongst four other of the objects of the power, subject to such limitations in respect of the interest in their respective shares, to be taken as between themselves, their wives and issue respectively, as Ann Goldsmid should appoint. Ann Goldsmid by will limited the share of one of the appointees to trustees for the appointee, his wife and children, the wife not being *an object of the original power*. It was held by Sir James Wigram, V. C., that the appointment was an effectual execution of the power, being equivalent to an appointment to Ann Goldsmid, and a subsequent and independent settlement by her of the fund which she acquired by such appointment. "I have examined the cases," said his Honor, "on this subject, and I find that they lay down the rule with great clearness, and bear out the proposition, that, in equity, a valid appointment may be made to persons who are not objects of the power, with the approbation of the persons who are the objects of the power; and the case is explained in the manner in which it was put in argument, namely, that the deed operates in two ways; first, as an appointment by the donee of the power; and, secondly, as a settlement by the appointee of the property in question; and I do not find that the suspicion which possibly might attach to the disposition has induced the Court to place cases of that description under any sort of control. In the simple case where there has been nothing more than the concurrence of the donee of the power and one of the objects of the power, to whom an exclusive appointment might be made, or to whom an appointment might be made coextensive with the amount of the property disposed of, this Court has treated the appointment as valid and effectual. That point being expressly decided, the only question is, whether this case is governed by the same rule. I think the cases to which I have adverted are quite decided to this extent, that if the estates created by the will of Ann had been inserted in the deed of appointment itself, instead of being left to be carried out by the will of Ann, those estates would have been perfectly good, although the estates *were not given to persons who are named as objects of the power in the act of parliament*. The cases expressly

decide it on the principle I have before mentioned ; that is, an appointment to Ann, and then a settlement by Ann of the property she so acquired. If then the estates would have been good had they been actually set out and created in the deed of the 25th April, 1821, the question is *whether any difficulty arises from the circumstance that they are left to Ann afterwards to appoint*. Now, if the power given by the appointment had been a general power to Ann, there would have been that which the Court considers as equivalent to a gift of the property ; and then the case of *Bray v. Bree* (8 Bligh, N. S. 508 ; S. C. 2 C. & F. 453), though not wanted as an authority, would have borne out the proposition that the power was well executed. But it was argued on behalf of the plaintiff, that the limitation imposed in this case took away that character from the appointment and gave it the character of an unlawful delegation of power. If, however, the general gift would have had the effect attributed to it, I confess it appears to me at least open to argument, whether, in the case of a limited gift of property, the trustees being expressly authorized to limit the property, it would not have been sufficient ; but I think it is much safer to put this question upon the broad ground which the cases I have referred to establish, namely, that where the appointee, an object of the power, joins in the deed of appointment, and the deed shows that that which is done has been so done by agreement with that party, the Court considers that party as making a settlement of the property. If Ann, therefore, to whom unquestionably an exclusive appointment might have been made, agrees that the property shall be settled as in this case it has been, what possible difference can it make whether the property is given to Ann in the form of an interest, or whether a control over the property is given to Ann in the form of a power. The act complained of is not, according to the construction of the cases, the act of the donee of the power, but it is the separate act of Ann, which she acquired the power of exercising by means of the appointment first made by the donees of the power. The only shadow of distinction which I can discover is, that Ann, to whom the powers are given, is not named as a separate party to the deed, she is named as one amongst several trustees. If Ann had been named as a separate party in the deed, it appears to me the case would not have admitted of a doubt, for then it would have been simply that Ann, to whom according to the construction I have mentioned the estate is appointed, agreed that the property should be so settled ; and when I find Ann is one of the parties—one who assents and agrees to the arrangement—and that the appointment is actually made to Ann herself, it appears to me it would be a departure from the principles already established by the cases I have mentioned, to draw any distinction between those cases and the present. I have no doubt, therefore, that I am bound to declare that these instruments constitute a valid execution of the power."

Where a mother had a power of appointing a reversionary fund to her daughters, and a daughter who was under age and about to marry, the mother appointed that a moiety of the fund should, on the marriage, become the portion of the daughter, and be vested in her or her intended husband

in her right, and to be paid to the husband, his executors, administrators or assigns, on the death of the tenant for life; it was held by Sir John Romilly, M.R., that although the husband was not an object of the power, and the fund was reversionary and the daughter an infant, that there was a valid appointment. *Wombwell v. Hanrott*, 14 Beav. 143.

II. *As to Excess in the Amount or Quantity of the Subject-matter of the Appointment.*

The principles which are applicable where there has been an excessive execution of a power with relation to its objects are also applicable where there is an excess in the amount or quantity of the subject-matter of the appointment. Thus, where a person had power to raise 7,000*l.* for younger children, and he charged the premises with 8,000*l.*; it was deemed in equity to be a good appointment for the amount of 7,000*l.*, the excess only being bad. *Parker v. Parker*, Gilb. Rep. 163.

So where a person had power to charge an estate with 2,000*l.*, to be raised two years after a term should come into possession, and he appointed it to be raised immediately. Lord Hardwicke said, that a mistake with respect to time of raising the sum would not make the appointment void. *Probert v. Morgan*, 1 Atk. 440, 441.

Again, where a person having power to grant a lease for twenty-one years, grants one for twenty-six years, although in law it would be void altogether (*Jenkins v. Kemisha*, Hard. 308; *Roe v. Prideaux*, 10 East, 158), in a Court of Equity it will be good for twenty-one years, and void only for the excess,—“because,” as Sir Thomas Clarke, M. R., observes, “it is a complete execution of the power, and it appears how much the appointor has exceeded it.” Ante, p. 304; see also *Parry v. Brown*, 2 Freem. 171; 3 Ch. Rep. 11; Nels. Ch. Rep. 87; *Anon.*, 2 Freem. 224; Barn. Ch. Rep. 11; *Campbell v. Leach*, Amb. 740. Even at law it seems, where the excess is contained in a distinct and independent limitation, that alone will be void (*Adams v. Adams*, Cowp. 651; Fitz. 157; 2 S. & L. 332; *Commons v. Marshall*, 6 Bro. P. C. 168, Toml. Ed.; *S. C.* Wall. by Lyne, 80, nom.; *Lessee of Lord Netterville v. Marshall*; and see *Thomlinson v. Dighton*, 10 Mod. 31, 71); unless the two limitations make but one estate; see *Peters v. Masham*, Fitzg. 156, 157, where the two former propositions are well illustrated. “If,” says Cheshire, Serjeant, arguendo, “a power were given to make leases for twenty-one years, if the person who is to execute such power makes a lease for twenty-one years, and by the same deed limits a further interest in this manner, viz. *and from and after the term aforesaid, for one year more*, the power is well executed by the first limitation, and the excess is surplusage not to be regarded; so when the plaintiff’s husband gave her an estate for life expressly, the appointment was complete, and remainder limited to the heirs of her body was idle, and so to be rejected as not warranted by the power: sed per Cur. the cases differ, for in the principal case, though the limitations are several and distinct, yet they make but one estate.”

It is clear, however, according to the principles before laid down, that in a Court of Equity the argument of the learned serjeant would have prevailed.

It seems, however, that at law, where the quantity of the estate to be given is marked out in the instruments containing the power, and it remains only for the donee to specify to what lands the estate is applicable, if he appoints a larger estate than that mentioned, as, for instance, an estate tail instead of an estate for life, although if it were considered as an execution of the power it would be void at law, it would be good as an appointment or designation of the lands, the estate taking effect under the instrument creating the power. *Peters v. Masham*, Fitzg. 156. And upon this principle, even had an inferior interest been limited, the appointee would take a life interest. *Ib.* 157. Fortescue, J., however, doubted whether a simple limitation of the lands would be good in such a case without a limitation of an estate; his remark, however, is contrary to the principle of the decision, and is not mentioned in his own report of the case. Fortesc. 339; nom. *Peters v. Morehead*. And see *Bland v. Bland*, 2 Cox, 349.

A conveyance to trustees for the benefit of a wife is not a good legal execution of a power to limit a jointure to her, for, as the execution of powers operates as a declaration of a use, and as if the limitation had been in the original deed, the gift to the wife is void, as there cannot be a limitation of a use upon a use; so likewise is the appointment to the trustees, since they are not objects of the power (*Churchman v. Harvey*, Amb. 335, 341, 825). But notwithstanding the improper interposition of trustees, so as to make it not a legal execution of the power to limit a jointure, yet it would be made good in equity, and although the heir at law, had he brought an ejectment, might have succeeded at law, a Court of Equity would have given relief to the jointress. *Ib.* 341, 824; *Crozier v. Crozier*, 3 Dru. & Warr. 353, 371.

The creation, however, of a term of 500 years in trustees has been held to be a good legal exercise of a power to appoint for such estate or estates, in such parts, shares and proportions, and in such manner and form as the appointor should think fit; and that the words "manner and form" enabled him to give equitable interests to his children. *Trollope v. Linton*, 1 S. & S. 477, 485.

If an instrument which purports to be in execution of a power conveys in language, the legal effect of which goes beyond the power, the instrument in which the power is given cannot be looked at, in order to correct the excess at law. *Wykham v. Wykham*, 18 Ves. 395, 415, 420.

Where a person executing a power has given a larger estate than is necessary, and he covenants for quiet enjoyment only during the time necessary to answer the beneficial interest, that covenant will not cut down the legal effect of the grant. *Wykham v. Wykham*, 18 Ves. 395, 420.

III. *As to Conditions unauthorized by the Power being annexed to the Gift.*

Where a condition not authorized by the power is annexed to a gift made

in execution of a power, if the power be otherwise duly executed, the gift will be good and the condition void. Thus, for instance, if a father, with power of appointing 1,000*l.* amongst his children, executes the appointment, but annexes a condition that they shall release a debt owing to them, or pay money over, the appointment of the 1,000*l.* would be absolute, and the condition only void. Per Sir Thomas Clarke, M. R., ante, p. 304. See also *Burleigh v. Pearson*, 1 Ves. 281; *Palsgrave v. Atkinson*, 1 Coll. 190. So a direction to the trustees to deduct from the sums appointed debts due from the appointee (*Hewitt v. Lord Dacre*, 2 Keen, 622); that the appointee should not sell or dispose of his interest (*Palsgrave v. Atkinson*, 1 Coll. 190), or should make a strict settlement thereof (Ib. 190); that payment should not be made until a particular time, or on a particular event taking place (*Dillon v. Dillon*, 1 Ball & B. 77); that an additional sum should be raised out of an estate (*Roberts v. Dixall*, 2 Eq. Ca. Abr. 668, pl. 19; 2 Sugd. Pow. App. 16, nom. *Roberts v. Dixwell*); it has been held that the direction, not being authorized by the power, was void, and the gift valid. And see the case of *Sadler v. Pratt*, 5 Sim. 632, ante, p. 307; and *Stroud v. Norman*, Kay, 313.

Where a testator duly appointed a fund in favour of objects of the power absolutely, and also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons *not* objects of the power; it was held by Sir J. Romilly, M. R., that this did not raise a case for election, although it would have done so had there been a direct appointment of the subject of the power to strangers. *Blacket v. Lamb*, 14 Beav. 482; *Warde v. Firmin*, 11 Sim. 235.

Under a power to charge an estate with a sum not exceeding 1,000*l.* for the portion or portions of a younger child or children, the donee of the power appointed the 1,000*l.* to a married daughter for her separate use, *with a restraint upon anticipation during the coverture*; it was held by Sir James Wigram, V. C., that the interest of the appointee might lawfully be so restricted by the terms of the appointment. "If," said his Honor, "the donee of the power might appoint a smaller sum than that which the utmost exercise of the power would enable him to give, as in this case he clearly could, why might he not also make the appointment for the life of the object of the power, or render the interest of the appointee determinable upon certain acts, or introduce provisions restraining the appointee in this case from treating with the property during the coverture? There is nothing invalid in the restrictive terms of the appointment." *Dickinson v. Mort*, 8 Hare, 178.

Although it is clear that where there is a power of appointment enabling the donee to distribute a fund, if an appointment be made with a condition attached, to be performed by the party to whom the appointment be made, the appointment will be good, and the condition void, nevertheless where there is an absolute power of appointment and selection, in favour of children, is given, there may be a conditional limitation over of one share in favour of other objects of the power, on a certain event specified in the

appointment. *Stroud v. Norman*, Kay, 313. "I think," said Sir W. P. Wood, V. C., "that the cases distinguish between a limitation over on a given event and a simple condition attempted to be attached to the execution of a power; and that it is too clear for argument that any person having a power of appointment among children, and of selecting such of them as she might think fit, might appoint to child A. on a certain contingency, and if that did not happen, then that the same share should go to child B. It is somewhat different where the appointment is to take effect in the event of A. doing a certain act, and if that be not done, then the share to go to B.; but still I apprehend, in deciding whether or not the power is duly exercised, under those circumstances, I must look to the event on which the limitation over is made to depend; and if it be consistent with the *scope and object of the power*, and not a fraud upon the power, then I am of opinion that the circumstance of the contingency, being an act to be performed by the appointee, does not make it different from any other contingency; such, for example, as the birth of other children." See also *Trollope v. Routledge*, 1 De G. & Sm. 662.

The general principle upon which these cases proceed, to use the words of Sir J. Clarke, M. R., in the principal case, is, "that where there is a complete execution of the power, and something *ex abundanti* is added, which is improper, if the boundaries between the excess and proper execution are precise and apparent, there the execution shall be good and only the excess void." Ante, p. 304.

Where, however, the boundaries between the excess and execution of a power are not distinguishable, it will be bad altogether. Thus in *Hay v. Watkins*, 3 Dru. & Warr. 339, where the appointee, after reciting by his will his power, bequeathed as follows:—"I leave and bequeath unto my daughter Harriett, a further sum of 200*l.*, to have me properly buried in this island, and to pay what small debts I may owe in this island at my decease;" it was held by Lord St. Leonards, then Lord Chancellor of Ireland, that the appointment was bad, and that the 200*l.* was to go as if unappointed. "Can it be argued," said his Lordship, "that it was intended that this lady was to take this sum of 200*l.*, and comply with neither of the conditions? that, however, may be said of every such case." His Lordship apparently does not put the case upon this ground, for similar reasonings would apply to almost every case which has been before cited, where the condition was held void, and the gift good, although it must have been the intention of the appointee in imposing the condition to have expected its fulfilment. His Lordship then goes on to give a more satisfactory reason for the decision. "But, still further, here it is difficult to separate the gift from the condition, they constitute an entire gift. . . . It is like the case of a legacy, where there is no gift except in the direction to pay. I cannot separate the gift from the condition, and therefore must hold the appointment to be bad. I believe this to be the soundest construction, although I do not think the case free from difficulty."

THOMAS CADELL *Appellant* ;

ARTHUR PALMER, CHARLES CADELL EDRIDGE, HENRY BENGOUGH, HENRY RICKETTS the Younger, RICHARD RICK- ETTS the Younger, WILLIAM IGNATIUS OKELY and ANN ELIZABETH his Wife, late ANN ELIZABETH BENGOUGH, Spinster, and ANN RICKETTS the Younger, WILLIAM PETER LUNELL, JOHN EVANS LUNELL, GEORGE LUNELL, SARAH BENGOUGH and GEORGE BENGOUGH	}	<i>Respondents.</i>
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Feb. 15, 1832; May 20 and June 25, 1833.

[REPORTED 1 CLARK & FINNELLY, 372.]

DEVISE—PERPETUITY.]—*A limitation, by way of executory devise, which is not to take effect until after the determination of a life or lives in being, and a term of twenty-one years, as a term in gross and without reference to the infancy of any person, is a valid limitation. Secus, if to the term in gross of twenty-one years be added the number of months equal to the longest or ordinary period of gestation.*

This being held to be the established rule, a decree of the Court below, declaring that a limitation by way of executory devise, which was not to vest until after the expiration of a term in gross of twenty years from the decease of the survivor of twenty-eight persons, who were living at the testator's decease, and of whom seven only were to take interests under the devise, is a valid limitation, was affirmed accordingly.

HENRY BENGOUGH, Esq., by his will, dated the 9th day of April, 1818, gave and devised, from and after the decease of his wife Joanna Bengough, his messuage, with the gardens, stables and other

appurtenances belonging thereto, situate in St. James's Square, Bristol, to the Rev. Charles Lucas Edridge, Arthur Palmer, the Rev. Cadell Edridge and George Wright, their heirs and assigns for ever, upon trust, for sale ; and directed the proceeds to sink into and become part of his personal estate. He further gave and devised to the said trustees, their heirs and assigns, certain other real estates, upon trust, to permit his wife to occupy a part thereof during her life, and, after her decease, to pay out of the rents and profits an annuity of 300*l.* to his nephew George Bengough, for life, and an annuity of 200*l.* to his nephew Henry Bengough, for life, and subject to the payment of the said annuities, and otherwise subject, as in the said will mentioned, upon trust, from time to time, during the term of twenty-one years, to be computed from the day of the testator's decease, to collect and receive the rents and profits of all his real estates so devised to them (except the house in St. James's Square), and from time to time, during the continuance of the said term, to lay out the monies to arise from such rents and profits in the purchase of freehold estates of inheritance, in England, when and as often as there should be a surplus in hand amounting to the sum of 1,500*l.* And he directed the estates so to be purchased, to be conveyed to the trustees, upon the same trusts and conditions as were thereafter (a) limited concerning his estates thereinbefore devised ; and that the trustees should not permit more than 500*l.* to remain in bankers' hands, but should invest the same in the Three per Cent. Consolidated Bank Annuities, until a convenient purchase could be found, and add the interest to the principal, to accumulate during the said term in the same manner as the rents and profits of the real estates were before directed to accumulate ; and as to all the said trust estates and hereditaments so by him thereby devised (except his said messuage in St. James's Square), upon trust, that the trustees for the time being should retain and stand possessed of the same during the term of 120 years, to commence from his death, if his said nephews George Bengough and Henry Bengough, his nephew James Bengough, his great-nephews Henry Ricketts the younger and Richard Ricketts the younger, his niece Ann Elizabeth Bengough, his great-niece Ann Ricketts the younger, the ten children then living of the said Charles Lucas Edridge (for whose names a blank was left in the will), and

(a) See the report of this case under the title of *Bengough v. Edridge*, 1 Sim. 273, where the Vice-Chancellor ordered " here-

inbefore" to be substituted for " herein-after." That part of the decree is not appealed from.

the eleven children then living of the said Arthur Palmer (whose names were mentioned), or any or either of his said nephews and niece, and great-nephews and great-niece, or any or either of the said several children of the said Charles Lucas Edridge and Arthur Palmer, should so long live; and also during the term of twenty years, to be computed from the expiration or other sooner determination of the said term of 120 years determinable as aforesaid, nevertheless upon trust for his said nephew George Bengough, for a term of ninety-nine years, if he should so long live, and the said terms of 120 years and twenty years, or either of them, should so long continue; and from and after the expiration or other sooner determination of the said term of ninety-nine years, then in trust for the first, second, third, fourth, fifth, sixth and all and every other and subsequent born son of the same George Bengough, severally and successively, according to the priority of their births: and after the determination of the estate and interest of each of the same sons respectively, and also, as the circumstances of the case should require, after the determination of the estate of any person taking from time to time under, or as answering the description of heir male of his body, in trust for the person who for the time being and from time to time should answer the description of heir male of his body, or who in case of the death of his parent, if such death had taken place, would be heir male of his body, under an estate tail limited to the same son and the heirs male of his body, to hold to the same son or person respectively for a term of ninety-nine years, if the same son or person respectively should so long live; and the said terms of 120 years and twenty years, or either of them, should so long continue, every elder of the same sons and the person who for the time being and from time to time should answer, or who in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body, to be preferred before every younger of the same sons, and the person who for the time being should answer, or in case of the death of his parent, if such death had taken place, would answer the description of heir male of his body.

The testator then declared several successive trusts of the said estates during the said terms of 120 years and twenty years, in favour of his nephews Henry Bengough and James Bengough, his great-nephews Henry Ricketts the younger and Richard Ricketts the younger, his niece Ann Elizabeth Bengough, and his great-niece Ann

Ricketts the younger, respectively, and their respective first and other subsequent born sons, and of the persons who for the time being should be, or who in case of the death of their respective parents would be heirs male of such sons respectively, similar to the trusts before stated to have been declared in favour of the said George Bengough, and his first and other subsequent born sons, and of the person who for the time being should be, or who in case of the death of his parent would be heir male of the body of each of the same sons respectively, except that he directed that the estates of the said *Henry Ricketts* and *Richard Ricketts*, and of their respective sons, and of the person or persons answering the description of heirs male or heir male of their respective bodies; and also the estates of the said Ann Elizabeth Bengough and Ann Ricketts, and of their respective husbands, and of their first and other sons, and of the persons answering the description of heirs male of their respective bodies, should respectively cease, if he or they for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the income of the said trust estates. And from and after the determination of the said respective estates and interests, then in trust for the person or persons respectively, who for the time being, and from time to time, should answer the description of the testator's heir or right heir-at-law; and if there should be more than one, in the same proportions as they would be entitled to a real estate descending from the testator as the first purchaser, and vesting in him or them as his right heirs, to hold to the same person or persons respectively, if more than one, as tenants in common, as to each of the same persons respectively, for a term of ninety-nine years, if the same person should so long live, and the said terms of 120 years and twenty years or either of them, should so long continue.

The testator further directed that each of the said terms of ninety-nine years should be computed from the time when the person or persons respectively to whom the same were limited should become entitled to the income of all or any part of the said trust estates, under the limitations thereinbefore contained; and that in case the said limitations in favour of persons unborn could not take effect, precisely in the order in which they were directed, and there should consequently be any suspension of the beneficial ownership, by reason that the persons entitled to take under the same limitations or trusts should not be

then born, in that case the income of his said devised trust estates should, during such suspension of ownership, belong to and be enjoyed by the person or persons for the time being entitled, or who, in case there had not been such suspension of ownership, would for the time being have been entitled to the next estate in remainder, subject nevertheless to the right of any person or persons to be afterwards born, and who would have been entitled, under any prior limitation, to receive the income of his said trust estates from his, her or their actual birth or respective births.

The testator then directed, that after the expiration or sooner determination of the said terms of 120 years and twenty years, his said trust estates should be conveyed and assured by his then trustee or trustees thereof, to such person or persons as would at that time be entitled to the same, either by purchase or by descent, for the first or immediate estate or estates for life, in tail, or in fee in them, if the same had by his will been devised, settled or assured to the use of his nephew, the said George Bengough, and his assigns for his life, with remainder to his first and other sons successively, according to the priority of their births, in tail male, with remainder in similar estates for life, and remainders in succession to the said Henry Bengough, James Bengough, Henry Ricketts, Richard Ricketts, Ann Elizabeth Bengough, Ann Ricketts, and their sons respectively, with a proviso for the cesser of the estates of the said Henry Ricketts and Richard Ricketts, and their respective first and other sons, and the heirs male of their respective bodies, who for the time being should refuse to take the surname and bear the arms of Bengough only, after he or they respectively should become entitled to the receipt of the said income; and also for the cesser of the estate of the said Ann Elizabeth Bengough and Ann Ricketts, and their respective husbands, and their first and other sons, and the heirs male of their respective bodies, who for the time being should make a like refusal, with reversion to the testator's own right heirs. And he further directed, that the person or persons to whom such conveyances should be made, should have such estate in the said trust estates, as he or they would at that time be entitled to take under the said limitations, if the same had been actually made by his will, with the same or the like remainders over, as if the said trust estates had been devised by his will in manner aforesaid, or as near thereto as might be, and the circumstances of the case and the rules of law and equity would permit; yet, nevertheless, that no such person should have

or be entitled to a vested estate or any other than a contingent interest, until the expiration or sooner determination of the terms of 120 years and twenty years; and he declared that such limitations were introduced into his will only for the purpose of ascertaining the objects to whom such conveyances should be made, and not for the purpose of making any immediate devise or gifts, or raising any immediate or present estate by way of trust or otherwise for them; on the contrary thereof, he directed that during the said terms of 120 years and twenty years, no person or persons should be entitled, at law or in equity, to any beneficial estate in his said trust estates, or the income thereof, by way of vested interest, for any longer period than ninety-nine years, determinable as before mentioned, and that in the events and in the mode before expressed, heirs or heirs of the body should be entitled to take in the first instance, and as purchasers in their own right. And he directed, that if at any time during the said terms of 120 years and twenty years, each of the male persons who for the time being should be entitled to the income of his said trust estates should require the same, it should be lawful for his trustees to convey to each or any person making such request, the said trust estates, or part thereof, as he should be entitled to under the limitations thereinbefore contained, for an estate of freehold for the life of the same person, so as to give him or her an estate of freehold, instead of an estate for ninety-nine years.

The testator, after giving various other directions and powers concerning the said trust estates, and after bequeathing several legacies and annuities, gave and bequeathed to the said trustees, their executors and administrators, all the residue of his personal estate whatsoever, upon trust that they should either continue his monies upon the securities upon which they should be invested at his decease, or call in the same, and sell all such parts of his residuary estate and effects as should not consist of money or securities for money. And he directed, that, during the term of twenty-one years, to be computed from the day of his decease, the trustees for the time being of his will should receive the dividends, interest and annual income of all his residuary estate, and from time to time during such term invest all such dividends, interest and income, and the accumulations of the same, in their names, either in the Three per Cent. Consolidated Bank Annuities, or upon mortgages of freehold hereditaments in Great Britain, as they should think proper, as an accumulating fund, in order to increase the principal of his residuary estate during such term of

twenty-one years; and should, with all convenient speed, from time to time during that term, lay out and invest all his residuary estate and effects, and all accumulations thereof, in purchases of freehold hereditaments of an estate of inheritance in fee simple in England and Wales, when eligible purchases should arise; which estates, so to be purchased, should be conveyed unto and to the use of the trustees, in fee, upon the same trusts and under and subject to the same and the like powers, provisoes and limitations as were by him thereinbefore declared concerning his said estates devised to them in trust as thereinbefore mentioned, or as near thereto as the death of parties, the change of interests and other contingencies would admit; and he appointed his said trustees to be executors of his said will.

The testator died in April, 1818, and his three first-named trustees and executors shortly afterwards proved his will, and became his legal personal representatives, George Wright having renounced probate and executed a deed of disclaimer to them as to the trust estates.

Ann Ricketts, the testator's only sister, and next of kin at the time of his death, died in the month of October, 1819, having by her will appointed the respondents, W. P. Lunell, J. E. Lunell and George Lunell, executors thereof; and they proved the same, and became her legal personal representatives.

Mrs. Bengough, the testator's widow, died on the 10th of June, 1821, having duly made and published her will, and appointed as executors thereof the said Rev. Charles Edridge (since deceased) and Thomas Cadell, the appellant, who duly proved the same, and thereby became her legal personal representatives.

George Bengough, the testator's nephew, and first taker of an estate under the limitations in the will, filed his bill in Chancery in the year 1821 (amended in 1823) against the acting trustees and executors, and against the said Henry and James Bengough, Henry and Richard Ricketts, Ann Bengough and Ann Ricketts the younger, and also against the said personal representatives of Joanna Bengough the widow, and of Ann Ricketts the sister, of the testator; and after stating the said will, and his own rights under it, and as heir-at-law and one of the then next of kin of the testator, he prayed (amongst other things) that the will might be declared to be well proved, and that the trusts thereof, so far as the same were good in law, might be decreed to be carried into execution, and that an account might be taken of the personal estate and effects of the testator, and of his funeral and

testamentary expenses and debts and legacies; and that the clear residue of the personal estate might be applied upon the trusts of the will, so far as the same were effectual in law; and as far as the same were ineffectual in law, then to such person or persons as would in such case by law be entitled thereto; and that an account might be taken of the testator's real estates and of the rents received by the trustees, and that what should be found due from them on taking that account might be applied upon the trusts of the will, as far as the same were good in law; and that the Court would be pleased to declare how far the trusts of the real and personal estate were good; and, as far as the trusts were declared to be void, that the plaintiff might be declared to be entitled to the real estate; but in case the trusts of the will should be considered valid, then that such of the rents and profits of the estates devised to the trustees in possession, as accrued during the life of Mrs. Bengough, might be applied in the purchase of freehold estates of inheritance in England or Wales, and that the annuities of the plaintiff and Henry Bengough might be paid out of the rents and profits that had accrued, and should accrue after her death; and that the residue thereof might, during the remainder of the term of twenty-one years, be also applied in the purchase of freehold estates of inheritance in England or Wales; and that such estates, when purchased, might be conveyed to the trustees upon the trusts declared of the estates so to be purchased; and that, as often as there should be the sum of 1,500*l.* arising from the rents and profits of the devised estates, it might be laid out in such purchases of freehold estates as aforesaid; and that the plaintiff might be declared to be entitled to the immediate possession and enjoyment of the said estates so to be purchased for the term of ninety-nine years, if the plaintiff should so long live, such term to be computed from the death of the testator; and that in case the said rents and profits should not, as soon as they amounted to 1,500*l.*, be so laid out, the plaintiff might be declared entitled to the interest and dividends thereof from the time the same amounted to 1,500*l.* until the same should be laid out in the purchase of freehold estates; or that, in case the said trusts were partly valid and partly invalid, then that proper directions might be given for effectuating such of the trusts as were valid, and for declaring and effectuating the rights of the persons entitled, so far as the trusts were invalid.

The defendants having put in their answer to the bill, the cause came on to be heard before the Vice-Chancellor in 1823, when an

order of reference was made to the Master, who, in pursuance thereof, reported that the plaintiff was, at the time of the death of the testator, and then was, the heir-at-law of the said testator; and that the said Ann Ricketts, deceased, the sister of the said testator, was his only next of kin at the time of his death, and that William P. Lunell, J. E. Lunell and George Lunell, were then her legal personal representatives, and the only persons who, together with the plaintiff and the said Henry Bengough, James Bengough and Ann Elizabeth Bengough (the children of the said testator's late brother, George Bengough), and the said Charles Lucas Edridge, and the appellant, the executors of Joanna Bengough, the widow of the said testator, would, in case of intestacy, have been entitled to distributive shares of the personal estate of the testator.

Upon the death of James Bengough, the suit was revived against Sarah Bengough, his widow and personal representative; and William Ignatius Okely, having married Ann Elizabeth Bengough, was subsequently made a party to the suit.

The cause having come on to be heard on further directions, before the Vice-Chancellor, his Honor, by a decree, bearing date the 24th day of January, 1827, ordered it to be declared (amongst other things) that the testator's said will ought to be established, and the trusts thereof carried into execution, &c. His Honor, in giving his judgment in respect of that part of his decree, said, "that although the rule of law be framed by analogy to the case of a strict settlement, where the twenty-one years were allowed in respect of the infancy of a tenant in tail, yet he considered it to be fully settled, that limitations by way of devise or springing use might be made to depend upon an absolute term of twenty-one years after lives in being (*b*)."

From this part of the decree the personal representative of the testator's widow appealed to the House of Lords, and the appeal came on for hearing in February, 1832.

Sir *Edward Sugden* and Mr. *Lynch*, for the appellant, argued to the following effect:—The testator in this case had two objects in view; first, to suspend the vesting of the inheritance for a period of 120 years, determinable upon twenty-eight lives, and for an absolute term of twenty years from the death of the survivor of them, being, as he conceived, within the rule of law against perpetuity. His second

(*b*) *Bengough v. Edridge*, 1 Sim. 267.

object was, during this period of suspension of the inheritance (after a period of twenty-one years allotted for accumulation), to confer the enjoyment of the estate upon, 1st, his nephew, G. Bengough, for a period of ninety-nine years, determinable on his life, and the said terms of 120 years and twenty years, with remainder to his son (not born at the testator's decease), for a like period of ninety-nine years, determinable on his life, &c., with remainder to the grandson of his said nephew for a like period, determinable on his life, &c., with remainder to the great-grandson of his said nephew for a like period, determinable on his life, &c.; and so on, in respect of all the heirs male of the body of his nephew George, all taking as purchasers, and all taking estates only for ninety-nine years, determinable on their lives respectively, and on the terms of 120 years and twenty years. And he conferred similar limitations on his nephew Henry, and the heirs male of his body, &c., and on his third nephew, and the heirs male of his body, &c.; these being the persons that would take in case the inheritance was not suspended, and being the persons to whom the inheritance is to be conveyed when the suspension is to cease, and to whom at any time the trustees may limit an estate of freehold. We submit that the whole machinery of this will is a *fraud on the rule of law against perpetuity*. The accumulation is taken for the whole term of twenty-one years, allowed by the Thellusson Act (c), and without reference to any minority or any legitimate object of settlement; and it is not until the expiration of that term that the limitations are made to commence. Accumulation and executory limitations were, by the law as it stood before the Thellusson Act, coextensive; but a testator could not first accumulate for lives in being and twenty-one years, and then postpone the vesting for a like further period. The limitation of the estates for 120 years, if twenty-eight persons, or any or either of them, shall so long live, taken by itself, is not objected to; but there is added a term in gross of twenty years upon the same trusts. The twenty-one years allowed by the rule after lives in being were admitted for the purposes of gestation and infancy, and were never allowed as an absolute term. Here the twenty years are taken as an independent term, merely because that term falls within the words of the rule, altogether disregarding the principles upon which it was founded. After every rule has been separately resorted to, and the time allowed by it exhausted, then comes a trust for the very persons who would

be entitled to the freehold and inheritance under the previous trusts, if regular trusts had been declared for life and in tail, according to the usual form of settlements. All this machinery is a vain attempt at a perpetuity, and the consequences are obviously mischievous. Sir Joseph Jekyll, in the case of *Stanley v. Leigh*, defines a perpetuity; and Chief Baron Gilbert, in his *Treatise on Uses*, tells us what tends to it. "All limitations," he says, "that tend to the provision of a family, and to secure against contingencies that are within the parties' own immediate prospect, are to be favoured; but all limitations that perpetuate, or tend to a perpetuity, are in themselves void, and repugnant to the policy of the law (*d*)."¹ When Lord Nottingham was asked, in *The Duke of Norfolk's Case*, where he would stop, he answered, "I will stop everywhere, when any inconvenience appears; nowhere before; for whensoever the bounds of reason or convenience are exceeded, the law will quickly be known." Now the time to stop has arrived; the bounds of reason are exceeded, and the inconvenience is manifest. The conclusion to which it is desired to bring your Lordships is, that the trusts declared of the personal estate and effects of the testator should be declared void, and the residue of such personal estate divided among the parties entitled to distributive shares thereof, as if the testator had died intestate.

In former cases the question has been, who, at a limited period after the testator's death, was to take the estate? And in the meantime either a different set of persons or the heir-at-law was to take it; but here the testator meant, that from his death there shall be taken devisees under his will during the existence of the fictitious terms of 120 years and twenty years. The persons are to take not for accumulation, not for anything collateral to the testator's general object, but as devisees; and, after the expiration of 120 and twenty years, a new taker is not to be sought for, but the person then to take is precisely the same person who has taken, and then is in possession under the previous limitations. Terms of years are introduced into marriage settlements and wills, for the purpose of raising portions, charges or other sums of money, in order to provide for the necessities of families. These terms are not introduced into this will for any such purpose, and the legal estate for these terms is not conferred on trustees, distinct from the holders of the inheritance, in order that they may raise a sum of money for the necessities of a family. The whole legal fee-simple is vested in the trustees,

(*d*) Gilb. on Uses, 359.

and they are merely directed to stand possessed of a portion of the inheritance for the terms of 120 and twenty years. But they have no duty to perform, and the only purpose for which these terms are created is to evade the law. The law says, that a succession of life estates cannot be given to unborn issue; and yet, if the limitations of this will are to be supported, there is a contrivance by which any testator may evade the law. The trusts of a term can be no otherwise limited in equity, than the estate may be limited at law. It is quite clear that the testator could not have attempted to carry his two objects into effect without the machinery of the term of 120 years, determinable on the twenty-eight lives, and of the term of twenty years. Now if this machinery can be displaced, if part only be taken away, the whole fabric must fall. If we take away this absolute term of twenty years, the whole machinery must give way.

We shall, therefore, first apply ourselves to this objection, that the testator has taken an absolute term of twenty years after lives in being, which is not allowed by the law. Every executory devise being, as far as it goes, a perpetuity, and being of late origin, introduced, or rather allowed, for the purpose of indulging testators in the distribution of their property, but within certain limits, it is incumbent on a party whose title depends on it, to show that it does not exceed the limit allowed. It will be for the other side to do this. What it is proposed now to do is, to state to your Lordships the several leading cases on the subject of executory devises, and the *dicta* of the several Judges; and to show your Lordships, that in no one of these cases has an absolute term of twenty years been allowed. If there be no case in which an absolute term has been allowed, then, with submission to your Lordships, we contend, that the appellant's case is proved, and that the testator has exceeded the bounds allowed by law.

The earliest case which can be usefully cited, relating to executory devises, is the case of *Matthew Manning* (e). Lord Coke alludes to a few earlier cases in the Year Books, and some of them before the Statute of Wills, relating to lands which might be devised by custom, but they were all executory devises, after a life in being. The case of *Manning* was an executory bequest of a term after a life in being, and Lord Coke justified and supported it on the ground that an executory devise after a life in being was good, the utmost limit then allowed being a life in being. There is an earlier case of *Hinde v. Lyon* (f),

(e) 8 Co. 94.

(f) 2 Leonard, 11.

which ought perhaps to be noticed, but is an executory devise after one life only. *Lampet's Case* (g) may also be mentioned as confirming, but only as confirming, *Manning's Case*. The case of *Child v. Bailie* (h), which was decided immediately after Lord Coke's time, is an authority the other way, and, although the Judges endeavoured to distinguish it from *Manning's* and *Lampet's Cases*, it is clear that the cases were not distinguishable. It was affirmed in the Exchequer Chamber by six of the Judges (i), and they said they would not question *Manning's* and *Lampet's Cases*, but that they would not extend the doctrine, and would not apply the doctrine therein laid down, except in cases exactly similar. The next case is that of *Pells v. Brown* (k), called by Lord Kenyon the *Magna Charta* of this branch of the law, but all that was decided there was the legality of an executory devise on a contingency not exceeding a life in being, and even this case was doubted by Chief Baron Montague, in the *Duke of Norfolk's Case*, to which we shall advert immediately. The next case is *Sanders v. Cornish* (l); it was a case of a term of years, and we refer to it to show, that the Judges there endeavoured to revive the old doctrine, that a possibility could not be limited after a possibility. The next case is that of *Pearse v. Reeve* (m), in which the Judges also stated their determination not to go further than *Manning's Case*. The case of *Goring v. Bickerstaffe* (n) is the next case, and the first case wherein the opinion of the Judges was called for respecting several lives, all in existence at the same time; and the case that comes next is that of *Snowe v. Cuttler* (o); there the Court seems rather to have retrograded, and again confined the rule to one life, for in that case they would not allow fourteen years after a life in being, even in reference to minority. However, in *Love v. Windham* (p), which is the next case, the Judges again allowed of several lives. In the same year the case of *Wood v. Saunders* (q) was decided, the case so much relied on in the *Duke of Norfolk's Case*, by Chief Baron Montague. The important case of *Taylor v. Biddal* (r) is the next in point of date, and it is the first authority that an executory devise might be limited after a life in being, and twenty-one years, in reference to minority.

(g) 10 Co. 46.

(h) Cro. Jac. 459.

(i) Sir W. Jones, 15.

(k) Cro. Jac. 590.

(l) Cro. Car. 230.

(m) Pollexf. 29.

(n) Ibid. 31.

(o) 1 Lev. 135.

(p) 2 Keble, 657; 1 Mod. 50.

(q) Pollexf. 35; 2 Swanst. 467.

(r) 2 Mod. 289.

The *Duke of Norfolk's Case*, called the case of perpetuity, is the next (s). The Lord Chancellor Nottingham was assisted by the two Chief Justices and Chief Baron, who were against the executory devise; the Lord Chancellor was in favour of it; and Lord Chief Justice North, who decided *Taylor v. Biddal*, was one of the three chiefs. This case was reversed after Lord Nottingham's death by Lord North, then Lord Keeper, but was afterwards affirmed by the House of Lords, reversing Lord Keeper North's decree. The next in order is that of *Massenburgh v. Ash* (t); and the next case in point of date is that of *Lloyd v. Carew* (u). Upon what ground was that case decided? On the ground of twenty-one years being allowed? No; but on the ground that a reasonable time was necessary to be allowed to perform the condition, which could not have been executed in the life of the donor. The bill was in the first instance dismissed, but that decision was reversed in the House of Lords. After the case of *Luddington v. Kime* (x), next in date, came a very important case, which clearly shows that the utmost then allowed was a life or lives in being. That was the case of *Scatterwood v. Edge* (y). The Court held that twenty or thirty years was the probable result of taking lives in being; and in the general use made of taking lives in a family settlement, limiting one remainder after another, that might be a fair calculation; but when you come to talk of twenty-eight lives, the calculation must be not twenty or thirty years, but fifty or seventy years, thereby substituting years for lives.

The cases that come next are *Marks v. Marks* (z), and *Gore v. Gore* (a), and *Maddox v. Staines* (b), and *Stephens v. Stephens* (c), which last was decided by Lord Hardwicke, as Chief Justice, and Lord Talbot, as Lord Chancellor; and which Lord Talbot hoped would be a leading case in the decision of all questions of this kind. *Gurnall v. Wood* (d) is the next case, and in that it is quite clear what Lord Chief Justice Willes meant, taking the whole of his judgment together; for when the cases alluded to by him are *Stephens v. Stephens* and *Taylor v. Biddal*, and we have the authority of Lord Hardwicke that, before *Stephens v. Stephens*, *Taylor v. Biddal* was the only case, it is clear he must have intended the twenty-one years in reference to

(s) 3 Ch. Cas. 1; 2 Freem. 72; Pollexf. 223.

(t) 1 Vern. 234, 304.

(u) Prec. Ch. 72, and Shower's Cases in Parl. 137.

(x) Ld. Raym. 203—207.

(y) 1 Salk. 229.

(z) 10 Mod. 419.

(a) 2 P. Wms. 28, 63.

(b) Ibid. 422.

(c) Ca. t. Talb. 228.

(d) Willes, 213.

minority: and he says executory devises are in wills what contingent remainders are in settlements; and, by what he says in another part of his judgment, he means that in respect of a contingent remainder, when the contingency happens, it vests in the remainderman, but he cannot alienate until he attains twenty-one. But in respect of executory devises, which were taken from contingent remainders, the vesting, as well as the power of alienation, may be suspended until the devisee attains twenty-one. From the case of *Sheffield v. Lord Orrery* (e), another case decided by Lord Hardwicke as Lord Chancellor, it appears that Lord Hardwicke thought that the twenty-one years must be in reference to minority, which was the exact point which he decided in *Stephens v. Stephens*. In the same year (f) the case of *Guliver v. Wickett* was decided in the King's Bench (g). The limitation there, no doubt, was a contingent remainder, and in reference to the devise, and taking the whole of what is said by the Chief Justice, it must be intended that speaking of twenty-one years he referred such time to minority; but at all events the most that can be said is, that this case left the question the same as it was before. Then came the case of *Bullock v. Stones* (h), a very important case, as it shows that Lord Hardwicke retained the same opinion which he entertained in the preceding cases. *Goodman v. Goodright* (i) is the next case, in the Court of King's Bench: it is unnecessary to state the facts, but merely to refer your Lordships to what Lord Mansfield said. In Michaelmas Term in the same year was decided the important case of *The Duke of Marlborough v. Godolphin* (k), by which it appears that Lord Northington entertained the same opinion as Lord Talbot and Lord Hardwicke did, that a term of twenty-one years was not a term in gross. That case came before this House, and the same doctrine is laid down in the printed case for the respondent, signed by Mr. York and other eminent counsel, and is not contradicted by the reasons on the other side (l). The next case that occurred, after that of *Doe v. Fonnereau* (m), is the case of *Heath v. Heath* (n), decided by Lord Thurlow. Is not that an actual case of minority? Is it anything more than what might be effected by legal limitations? A limitation to Edward Heath for life, with remainder to his son in tail, with re-

(e) 3 Atk. 282.

(f) 1745.

(g) 1 Wilson, 105.

(h) 2 Ves. 521.

(i) 2 Burr. 673.

(k) 1 Eden's Rep. 404, 418.

(l) 3 Bro. P. C. 245.

(m) Douglas, 487, 509.

(n) 1 Bro. Ch. Ca. 147.

mainder to William Heath in fee. It is in effect that it is a devise to Edward Heath in fee, but if he should die without leaving a son at his death, capable of alienating, it should then go over. Our proposition is, that the term is not an absolute term of twenty-one years; that it has in all cases reference to infancy, and all that that case decides is, that it is not necessary that the infancy or minority should be that of the party to take, or the party from whom it is taken. The case of *Jee v. Audley* (o), decided by Lord Kenyon, as Master of the Rolls, must have been erroneously decided, if this term of twenty-one years be an absolute term; and so must have been the case of *Routledge v. Dorril* (p), before Lord Alvanley, as Master of the Rolls; because, if there may be an absolute term of twenty-one years, the testator's daughter might have appointed to issue born within the twenty-one years after her death, but it was decided otherwise. The next case of *Long v. Blackall* (q) is most important, as it contains the opinion of Lord Kenyon, distinctly laid down, as to the length to which executory devises can extend. That case is also important, as being the first that allowed the time for periods of gestation at both ends of the term. Two years afterwards the case of *Thellusson v. Woodford* (r) came on to be heard before Lord Loughborough, in the Court of Chancery, assisted by the Master of the Rolls (Lord Alvanley), and Justices Lawrence and Buller. In that case the exact question did not arise, for there was no term of twenty-one years; it was merely a case of lives in being. But Lord Alvanley being afraid, from what Mr. Justice Buller had said, that it might be inferred that the twenty-one years might be an absolute term, without reference to minority, in giving judgment expressed himself decidedly to the contrary (s). When that case came afterwards before this House the Judges attended, and Lord Chief Baron Macdonald delivered their opinion; and in expressing that opinion, and referring to Lord Nottingham's judgment in the *Duke of Norfolk's Case*, he says, "With an easy interpretation we find from Lord Nottingham what that tendency to a perpetuity is, which the policy of the law has considered as a public inconvenience, namely, where an executory devise would have the effect of making lands unalienable beyond the time at which one in remainder would attain his age of twenty-one years, if he were not born when the limitations were

(o) 1 Cox, 324.

(p) 2 Ves. jun. 357.

(q) 7 Term Rep. 100.

(r) 4 Ves. 319.

(s) See 4 Ves. 319, 326, 337.

executed" (11 Ves. 135). And again, he says (p. 143), "The established length of time during which the vesting may be suspended, is during a life or lives in being, the period of gestation, and the infancy of such posthumous child." And Lord Eldon, in the same case (p. 146), expresses himself to the like effect, all strongly implying, that if there be a term added after lives in being it must be with reference to minority.

But your Lordships may see the opinion of Lord Eldon more clearly expressed in the case of *Griffiths v. Vere* (t), that opinion most clearly implies that the term of twenty-one years is not an absolute term, but qualified and referable to infancy. In the case of *Crooke v. De Vandes* (u), also before Lord Eldon, it was decided that a limitation to take effect at the expiration of thirty years from the testator's decease was too remote; and in the case of *Lade v. Holford* (x), the suspense of property for thirty-six years was held too remote; and in *Proctor v. The Bishop of Bath and Wells* (y), the possible suspense of property for twenty-four years was held too remote.

Let us next proceed to the important case of *Beard v. Westcott* (z). That case came on before Sir W. Grant, Master of the Rolls, he sent it to the Judges of the Court of Common Pleas, who returned a certificate in 1810. The effect of that certificate, if not overruled, was to allow an absolute term of twenty-one years. Sir W. Grant was not satisfied with that certificate, and entertaining the same opinion as his predecessor, Lord Alvanley, as to the absolute term of twenty-one years, he sent the case back to the Court of Common Pleas, particularly putting the question to the Judges. They returned a certificate (a) in 1813, confirming their former determination, and thereby establishing the validity of an absolute term of twenty-one years. Between these two certificates, the point was most ably discussed by a very learned and able writer, who was against the validity of the absolute term of twenty-one years. The case came on afterwards before Lord Eldon, Chancellor, who, not being satisfied with the certificates, sent the case to the Judges of the Court of King's Bench for their opinion. The Judges of the Court of King's Bench differed from the Judges of the Court of Common Pleas, and returned a certificate (b), that the devises over were void, thereby confirming the opinions of Lords Talbot, Hardwicke, Northington, Mansfield, Kenyon

(t) 9 Ves. 131; and see post.

(u) Ibid. 197.

(x) Amb. 479.

(y) 2 H. Black. 358.

(z) 5 B. & Ald. 801.

(a) 5 Taunt. 393, 406.

(b) 5 B. & Ald. 814.

and Alvanley, that the term was not an absolute term, but referred to minority. The case came on again upon that certificate (c), before Lord Eldon, and it was objected to the certificate, that it did not contain a sufficient answer to the case, and that it could not be collected from it, whether the circumstance, that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense in the vesting as to render the limitations void. But Lord Eldon said, it was impossible that the Court of King's Bench should not have considered that point. The certificate afforded a substantial answer to the questions put, and the inclination of his own opinion was, that the Court of King's Bench was right. The question, therefore, as it appears to us, is decided by all these cases. There is not a single case that can be adduced where an absolute term has been allowed after a life or lives. These decisions, and the *dicta* of all the learned Judges to whom we have referred, establish the contrary, and that the term must be referable to minority.

Now with respect to the text writers, and first in respect of Mr. Fearn, the passage in his book may probably be cited to induce your Lordships to think, that it was his opinion that an absolute term of twenty-one years was allowed (d). But we submit, that the whole of his reasoning on the point, and the cases which he refers to as illustrations, warrant the contrary inference, which is, that the period of twenty-one years, which he states to be the utmost limit after a life or lives in being, for deferring the vesting of the estate, has reference to infancy. The late Mr. Cruise in the sixth volume (e) of his Digest, and Mr. Justice Blackstone, in the second volume (f) of his Commentaries, have also laid down, that the utmost length that has been allowed for the contingency of an executory devise, is that of a life or lives in being, and twenty-one years afterwards. From the reasoning of these writers, and the cases cited by them, we are entitled to conclude, that they did not mean the twenty-one years as an absolute term. Now if the term of twenty years cannot be an absolute term, if the testator has exceeded the limits allowed, by taking this term, then the whole machinery must, as we conceive, fall to the ground. In *Lade v. Holford* the whole was considered bad, and there was no modelling of it; so also, it was held in *Crooke v. De Vandes*, already cited; in *Ware v. Polhill* (g);

(c) Turn. & Russ. 25.

(d) Con. Rem. and Ex. Dev. 431.

(e) Page 445.

(f) Page 174.

(g) 11 Ves. 257, 233.

in *Lord Southampton v. The Marquis of Hertford* (h); and in *Marshall v. Holloway* (i). If, then, the term of twenty years be cut off, the consequence will be, that there will be persons *in esse*, and willing to take if they could be allowed to do so by law, during the term of twenty years. But they cannot take during that term, because it is void, and yet the gift over cannot be accelerated, because the testator has said, that no person shall take the estate as purchaser until the expiration of that term, and your Lordships would not violate the testator's intentions. There is one period of time, composed of both terms, upon which the testator says, certain trusts are to arise. That period exceeds the boundary allowed by the law, and therefore all the trusts must fail. After the cases of *Goring v. Bickerstaff* and *Thellusson v. Woodford*, there can be no doubt that the vesting of property can be suspended for any number of lives, with this qualification annexed by Lord Chief Baron Macdonald and Lord Eldon, that they are not to exceed that number to which testimony can be applied to determine when the survivor of the lives dropped. Is that the case here? Of the twenty-eight lives twenty-one are altogether unconnected with the parties or the testator, all young and unsettled in life. These twenty-one persons may go all over the world, to the East and West Indies, to North and South America, and how could it be possible in such a case to determine when the survivor dropped. But the purposes also for which the lives are taken must be legal. In *Thellusson v. Woodford* they were taken for the purpose of accumulation, such purposes being then legal. But what are the lives here taken for? For the purpose of supporting limitations void at law. The testator is guilty of a fraud upon the rule of law by the use he has made of the twenty-eight lives; for it is a maxim of law, that that which cannot be done directly cannot be done indirectly. But it is said that the exility of the interests, viz. 120 years, determinable on lives and twenty years afterwards, out of which the trusts are to arise, privileges the trusts declared at this period of time; but in referring to perpetuity, limitations are to be considered according to their legal effect, and not by the quantity of interests out of which they are to arise; otherwise limitations held good in one case would be considered bad in another.

The term of 120 years is as vicious as the term of twenty years is illegal, and the trusts declared of both are void; and so also are the

(h) 2 V. & B. 64.

(i) 2 Swanst. 432.

ulterior trusts;—the direction to convey the inheritance from and after the expiration of the terms. All the limitations, therefore, being void, why should the trust for accumulation be retained? The accumulation was directed for purposes not allowed by the law, then why continue the accumulation? The heir-at-law and next of kin have a right to determine it. The point which arises between them is this, the personal estate is directed to be laid out in the purchase of lands, to be settled to certain uses, which we hold to be illegal. The purpose and object the testator had in view is not, and it cannot be, accomplished. Then what superior right or equity has the heir-at-law over the next of kin to ask the Court that the property legally belonging to the next of kin, dedicated by the testator for purposes which cannot be effected, should belong to him? Where, in the will, has the testator shown a preference to his heir-at-law over his next of kin? The case of *Tregonwell v. Sydenham* (d), is in point of principle in favour of the next of kin. It was decided there that the heir-at-law was entitled to all that was viciously given. Why? Because his right must be defeated by a valid disposition. Is not the same principle to be applied in case of personal estate and next of kin? Everything belongs to the next of kin, in like manner as to the heir-at-law, that is not taken away by valid disposition; here nothing is taken away by valid disposition. The personal estate must therefore be considered as undisposed of, and therefore belongs to the next of kin.

The further consideration of the case was then adjourned, and not resumed until the session of 1833, when Mr. *Preston* and Mr. *Wilbraham*, for the respondents, argued to the following effect, in support of the decree below:—

The most eminent conveyancers and text writers never doubted, as appeared from their drafts of settlement and published writings, that twenty-one years after a life or any number of lives in being might be taken as an absolute term. If any man studied this subject more diligently than another it was Mr. *Fearne*, who, on account of his profound study and knowledge of it, was more consulted than any man of his time. In his book on *Executory Devises*, he says, "This privilege of executory devises, which exempts them from being barred or destroyed, is the foundation of an invariable rule with respect to the contingency, upon which an estate of this sort is permitted to take effect, which is, that such contingency must happen within a short space of time, such as a life in being, and some few years after (e)." Having then stated

(d) 3 Dow, 194.

(e) Page 429.

some decided cases, and among them the cases of *Lloyd v. Carew*, and *Marks v. Marks*, in illustration of the rule, Mr. Fearne adds, "the limitations in the last two cited cases were confined to vest within a certain number of months after the end of a life in being. But these are not the utmost limits for executory devises, for the courts have gone so far as to admit of executory devises, limited to vest within a compass of twenty-one years after the period of a life in being (*f*);" and again he says (p. 438), "More instances of the established limits of executory devises will be given in the sequel, &c., only I shall observe in this place, that the law appears to be now settled, that an executory devise, either of real or personal estate, which must, in the nature of the limitation, vest within twenty-one years after the period of a life in being, is good, and this appears to be the longest period yet allowed for the vesting of such estates." Mr. Butler, in his notes to these passages, examines recent decisions in support of the doctrines laid down; and it may be taken as a proof of his agreeing with Mr. Fearne, that he, after citing the words of Lord Alvanley, in *Thellusson v. Woodford*, adds, "But in the subsequent case of *Beard v. Westcott* (*g*) it was held that an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being, at the death of the testator, without reference to the infancy of the person who was to take." In his and Mr. Hargrave's edition of Coke upon Littleton, in commenting upon the *Duke of Norfolk's Case*, he says (*h*), "The next advance in limitations of this nature was to extend them to a period within the compass of one or more life or lives in being, and twenty-one years after." That was the opinion of Mr. Butler, writing to the public; he also was much consulted in this branch of legal learning, and he had the largest collection of manuscript precedents of any man living, some of which contain limitations to the same effect. The same opinion was expressed by Mr. Sanders in his book on Uses (*i*), by Mr. Justice Blackstone (*k*), Mr. Wooddeson (*l*) and Mr. Cruise (*m*), without any restriction or qualification as to the minority of any one. All the text books have been examined, and not one passage is found in any one of them containing a contrary doctrine.

The Judges, the sages of the law, are as uniform as the text writers, in the assertion of the principles on which the decree of the Court

(*f*) Page 431.

(*g*) 5 Taunt. 393.

(*h*) Page 327 a, n. (2).

(*i*) Page 194, 4th ed.

(*k*) 2 Comm. 174.

(*l*) 2 Wood. 229.

(*m*) 6 Dig. 409—419, 437.

below is founded. In the case of *Stanley v. Leigh* (n), Sir Joseph Jekyll enters into the doctrine of perpetuities, and what he there says is a sufficient answer to more than one of the objections made to the limitations in the present case. "Let us see," he says, "what a perpetuity is. A perpetuity, as it is a legal word, or term of art, is the limiting an estate, either of inheritance or for years, in such manner as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after," &c. After showing the mischiefs arising from estates remaining a long time unalienable, he goes on to repudiate the old distinction in the doctrine of perpetuities between limitations of fee simple and of terms of years, and cites with approbation what Lord Nottingham said on the same subject in the *Duke of Norfolk's Case*: "It is objected," he says, (p. 690,) "that the deviser intended a perpetuity, and such intention will make the limitations void. Supposing the deviser did intend a perpetuity, it would be very strange, if, for that reason only, the law should make those limitations void; for if they do not really tend to a perpetuity, the bounds which the law has set to devises or limitations for years are not transgressed, nor any of its rules violated; so that the intention is vain, and ought to have no operation at all." Most, if not all, of the cases cited and examined by the counsel for the appellant, support the limitations of the will in the present case; and it therefore becomes material to examine them once more, and see what was the foundation of the decisions in them. Lord Chief Justice Willes, in the case of *Goodtitle v. Wood*, says, that "of late years the doctrine of executory devises has been settled; they have been considered, not as possibilities, but as certain estates and interests, and resembled to contingent remainders in all other respects, only they have been put under restraints to prevent perpetuities; as first, it was held that the contingency must happen within a life in being, &c.; and the rule has in many instances been extended to twenty-one years after the death of a person in being, as in that case, likewise, there is no danger of a perpetuity" (o). In the case of *Blandford v. Thackerell* (p), Lord Loughborough, then Chancellor, in his judgment, says, that the wisdom of the law has fixed the time (of suspension), which is twenty-one years after lives in being; up to that time you may have as many springing uses as you please. You may give a legacy to the grandson of A. born

(n) 2 P. Wms. 687.

(o) Willes, 213.

(p) 2 Ves. jun. 241.

in the life of A. It is a good description of the legatee, and he would take within twenty-one years after the life of the person in being. The rule of law admits of fourteen years (the period of suspension in that case) after the termination of lives in being, and goes to twenty-one years. The rule continued to be so understood in Mr. Justice Buller's time; and he, in the case of *Thellusson v. Woodford* (q), says, the rule allowing any number of lives in being a reasonable time of gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages, and we cannot shake that rule without shaking the foundation of the law. The same learned Judge, in another part of his judgment in the same case, observes (r), that "the number of contingencies is not material, if they are to happen within the limits allowed by law, &c. The twenty-one years are allowed because the law considers that time reasonable." Lord Alvanley, in delivering his opinion in the same case (s), says, that "by the *Duke of Norfolk's Case* it was clearly decided that every executory devise is good that does not tend to a perpetuity; the meaning of which is, that every executory devise is good that does not tend to make an estate unalienable beyond the period allowed by law as to legal estates, which could not be protected beyond the time at which the remainderman, who was not in existence at the time of the limitation of the estate, would arrive at the age of maturity." A little further on is the passage on which so much reliance is placed on the other side. It is this: "As to the period of twenty-one years, &c. Nor, with submission to the learned Judge (Buller), who immediately preceded me, has it ever been considered as a term that may at all events be added to such executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mère*." Was it fair in that learned judge to utter such a statement in the face of so many authorities to the contrary? Could he have read Mr. Butler's or Mr. Fearn's books? The reporter ought not to have taken notice of such a *dictum*.—[The Lord Chancellor: Do you think, Mr. Preston, that a reporter has a right to supply or suppress any part of a judgment?—Mr. Preston: I think a reporter has a discreet duty to perform; and if I were the reporter of that case I would not give that part of Lord Alvanley's opinion.]

(q) 4 Ves. 319.

(r) Ibid. 326.

(s) 4 Ves. 331.

The next case cited against us is that of *Jee v. Audley* (t), which was decided by Lord Kenyon, then Master of the Rolls, and the most profound property lawyer of his time. He and Lord Ashburton used to compare notes of cases and decisions. They were both bred in the same way, one with his father, a solicitor at Ashburton, the other also in a solicitor's office. He observes, in his judgment in that case, that "the limitations of personal estates are void, unless they necessarily vest within a life or lives in being, and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the *Duke of Norfolk's Case* to the present. It is grown reverend by age, and is not to be broken in upon." Next comes the case of *Roe v. Jeffery* (u), in which Lord Kenyon, then Lord Chief Justice, in delivering the opinion of the Court of King's Bench, says, "Nothing can be clearer in point of law than that, if an estate be given to A. in fee, and, by way of executory devise, an estate be given over, which may take place within a life or lives in being, and twenty-one years, and the portion of a year afterwards, the latter is good by way of executory devise." Lord Eldon, in the case of *The Countess of Lincoln v. The Duke of Newcastle* (x), on appeal in the House of Lords, says, "If the limitation had been to such son, at the age of twenty-one, as would be entitled to the trust in possession of the real estates, as the son must attain the age of twenty-one within twenty-one years after the expiration of the life of his father, allowing the period of gestation, that limitation would be within the limits permitted to executory devise." His Lordship, giving his judgment as Lord Chancellor, in the case of *Griffiths v. Vere* (y), more than once expresses himself to the effect, that by executory devise an estate may be prevented from vesting for a life or lives in being, and twenty-one years, with an addition at the end for the period of gestation. That was the settled law before the case of *Long v. Blackall*, in which it was settled, that a period for gestation might be allowed both at the beginning and end of the term. In no case has Lord Eldon, or any other judge except Lord Alvanley, said that the term was to be taken with reference to infancy. The next case of authority was that of *Beard v. Westcott* (z). The marginal note to the report of that case may mislead, and therefore the case itself, and the certificates

(t) 1 Cox, 324.

(u) 7 Term Rep. 589.

(x) 12 Ves. 232.

(y) 9 Ves. 132, 134.

(z) 5 Taunt. 394; and 5 B. & Ald. 801.

from the Courts of Common Pleas and King's Bench, must be looked to. The Judges of the Court of Common Pleas, who certified in the first argument, were Sir James Mansfield, Mr. Justice Lawrence (both complete on this subject), Mr. Justice Heath, who had been a conveyancing counsel, and answered numbers of cases, and Mr. Justice Chambre. Sir Vicary Gibbs, who succeeded Mr. Justice Lawrence on the bench, heard the second argument, and signed the second certificate. Lord Eldon sent the case afterwards to the Court of King's Bench, and the certificate of the Judges there is reconcilable with those sent by the Court of Common Pleas, and with all the authorities, and with the principle for which we contend in this case. The unprepared expression of Lord Alvanley has not availed to discourage conveyancers from inserting in devises a term of twenty-one years, without reference to infancy. Upon the authority of the cases already cited, and of several others equally applicable, it is submitted that no estate or interest given by this will is open to the objection of transgressing the rules of law against perpetuities. The period of accumulation is restricted to a term of twenty-one years from the testator's death, and an accumulation during that period is warranted by the rules of law, and is consistent with the provisions of the statute (a). Every contingent or future interest given is so limited that it must vest, or fail of effect, within twenty years from the death of the survivor of the lives in being at the date of the will. The rule of law against perpetuities allows, as has been shown, of a suspense of the time of vesting for a life or lives in being, and a further period of twenty-one years, and in some cases for a period and even two periods of gestation in addition. As the rule of law is not transgressed, but its limits are observed by the testator, no argument of fraud on the rule, or of inconvenience from the application of the rule, is entitled to any weight in a court of justice. It is the province of the legislature, and not of this House, sitting as a court of justice, to reform the law if it admits of an inconvenience. If your Lordships were to legislate anew on this subject, no man could frame a new rule to be substituted for the one which is established by the wisdom of ages, which is a fair deduction from reason and authority, and productive of no mischief whatsoever.

The rules of law relating to property are simple, and may be easily learned, if they be adhered to and not altered; it is when they are not adhered to that the difficulty in learning them arises. The argument

(a) 39 & 40 G. 3, c. 60.

against this will is, that it is a fraud on the rules of law; the same arguments were used against Mr. Thellusson's will. An act of parliament was passed to restrain accumulation to twenty-one years. The period for accumulation in that act is adopted in this will. The limitations after that period for a number of lives in being, and twenty years afterwards, is no fraud on the law, because the law allows even twenty-one years. There can be no objection to the number of lives; and if the limitations were confined to them there would be no question of their validity. The objection to Thellusson's will was not the number of lives, which were nine, but to the accumulation; so the objection here is not to the number of lives but to the additional term of years. A testator may multiply lives as he pleases, may take all the lives of this house, and secure the certainty of a longer period for the suspension of the estate than the addition of twenty years to twenty-eight lives. While *Heath v. Heath*, and other cases already commented on, remain in the books unimpeached; it is absurd to say that the term must have reference to the minority of the person who is to succeed to the estate, or of any other person.

(Besides the cases mentioned, the learned counsel cited and commented on those of *Somerville v. Lethbridge*, *King v. Cotton*, *Wilkinson v. South*, *Massenburgh v. Ashe*, *Kirby v. Fowler*, *Sheffield v. Lord Orrery*, *Gulliver v. Wickett*, *Goodtitle v. Wood*, and *Long v. Blackall*, all which were before referred to by the appellant's counsel.)

Sir *Edward Sugden*, in reply:—My learned friends have not removed my objection to this will, which is, that it is a fraud on the rules of law. The object of the testator was to provide life estates for every member of his family; but he desired to attain that object by cutting down other estates, and substituting one which is unknown to the law of England. The interests first given are all chattel interests, depending upon the lives of twenty-eight persons, who may be scattered all over the world, so that the person who may take a vested interest in the freehold cannot know when his estate arises. If any of your Lordships were to make his will, he would begin with a limitation for life, with which this testator ended. My friends are not correct in saying that Mr. Butler considered this question, as to the term in gross, concluded. Your Lordships, on looking into Mr. Butler's last edition of Mr. Fearn's book, will find several notes on what fell from Lord Alvanley in the case of *Thellusson v. Woodford*, which show that

Mr. Butler considered that point still open. The law raises no objection to estates granted in perpetuity, provided there be a power to bar or destroy them, so as to render them alienable, and of that nature were the leases and conveyances referred to by my learned friend. The authority of the late Mr. Cruise was cited in support of the validity of these limitations. I deny that this text can be so interpreted; but although I esteem his book, I must say that he never lays down a proposition in such a way as justifies any one to rely on it. I do not find fault with Mr. Justice Blackstone, who merely lays down a general rule, without adding whether the term of twenty-one years is to be taken in gross, or with reference to minority. What Mr. Wooddeson says of the term of twenty-one years is equally vague and undefined. I have a better right to conclude from the text, that both these commentators contemplated the case with reference to minority, than my friends have to draw the contrary inference; for whenever you mention a life or lives, and twenty-one years, you speak of the years with reference to minority, and it is not only twenty-one years you mean, but twenty-one years and some uncertain number of months in addition, both for infancy and gestation. My friends have said, that in the case of *Long v. Blackall* (b), Lord Kenyon, and Lord Eldon afterwards, in *Beard v. Westcott*, expressed themselves to the effect that the term may be taken absolutely. I cannot find any such opinions. The latter case, after it was argued in the King's Bench, came before Lord Eldon, Chancellor, on further directions, upon the certificate of that Court, and what Lord Eldon there says, as stated in the report (c), is clearly in favour of my proposition. Lord Kenyon and Lord Mansfield are also with me, and so is Lord Alvanley. My friend says, that if he were the reporter, he would not report the *dictum* of Lord Alvanley. Then it is well for the laws of England, in more senses than one, that my friend was employed otherwise than in reporting. Is a reporter to set down his own reasons instead of those of the Judge, and set himself above all the Judges? Lord Alvanley, apprehensive that what Mr. Justice Buller said, in giving his judgment in *Thellusson v. Woodford*, might be understood as having the deliberate concurrence of the Court, set himself right as to the rule of law, by saying, "As to the period of twenty-one years, it has never been considered as a term that may, at all events, be added to an executory devise or trust. I have only found this *dictum*, that estates may be unalienable for lives

(b) 7 Term Rep. 100.

(c) 1 Turn. & Russ. 25.

in being and twenty-one years, merely because a life may be an infant's, or *en ventre sa mère* (d). That is the doctrine that is laid down in *Routledge v. Dorrell* (e), the judgment in which was long delayed, and carefully considered. Lord Alvanley's opinion is entitled to the greatest respect and attention. My friends say that the rule, according to their interpretation, has been established since the *Duke of Norfolk's Case*. But there was no suspense there, except during a life in being; there was no term for years added.

Sir *Edward Sugden* again stated some of the cases already referred to, and more particularly those of *Lloyd v. Carew*, *Marks v. Marks*, *Massenburgh v. Ashe*, *Gore v. Gore*, *Heath v. Heath*, and *Stanley v. Leigh*; no one of which, he insisted, was against the rule, as he understood it; some were within it; some did not try it at all; and from others of them no notion could be inferred that any number of years could be added; but the addition of some months only, for the period of gestation, was formerly considered by some judges too much after the death of the parent. No case carried the indulgence farther than that of *Lloyd v. Carew*, and any attempt to extend it ought to be resisted. A period of not less than ninety years, on the most moderate calculation, must elapse after the death of the testator, before any estate can vest. Did any one ever think of such a suspension; whereas, formerly, a few months were considered too long? The suspension of these estates for so long a period is against the policy of the law, and the power given here to convert a chattel interest into an estate for life shows clearly that this was an attempt to evade the rules of law, an attempt which ought not to be favoured. Then, upon the assumption that this term of twenty years is against the law, the question arises, whether all the limitations are not void. I think they are; for part of them cannot be held good if part be bad. The rule laid down is this, where some of the limitations go beyond the period allowed by law, the whole are void: *Proctor v. The Bishop of Bath and Wells* (f), *Leake v. Robinson* (g). You cannot remodel this estate. There was never such an attempt to establish a perpetuity; and I call on your Lordships, in the words of Lord Nottingham, to stop when so manifest an inconvenience arises.

The LORD CHANCELLOR, after suggesting that he should be glad of the assistance of the counsel in framing questions for the learned

(d) 4 Ves. 337.

(e) 2 Ves. jun. 357.

(f) 2 H. Black. 358.

(g) 2 Mer. 363.

Judges, in order to dispose effectually of this question, moved to postpone the further consideration of the case, which was agreed to.

The learned Judges who attended were Justices A. Parke, Littledale, Gaselee, Bosanquet, Alderson, J. Parke and Taunton; Barons Bayley, Vaughan, Bolland and Gurney; and the following were the questions submitted to them :—

First. Whether a limitation by way of executory devise is void, as too remote, or otherwise; if it is not to take effect until after the determination of one or more life or lives in being, and upon the expiration of a term of twenty-one years afterwards, as a term in gross, and without reference to the infancy of any person who is to take under such limitation, or of any other person.

Secondly. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

Thirdly. Whether a limitation by way of executory devise is void, as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the longest period of gestation; but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*.

The learned Judges attended again on a subsequent day, and Mr. Baron Bayley delivered their opinion as follows; first, in answer to the first question :—I am to return to your Lordships the unanimous opinion of the Judges who have heard the argument at your Lordships' bar, that such a limitation is not too remote, or otherwise void. Upon the introduction of executory devises, and the indulgence thereby allowed to testators, care was taken that the property which was the subject of them should not be tied up beyond a reasonable time, and that too great a restraint upon alienation should not be permitted. The cases of *Lloyd v. Carew* (h), in the year 1696, and *Marks v. Marks* (i), in the year 1719, established the point, that for certain pur-

(h) 1 Show. Parl. Cas. 137.

(i) 10 Mod. 419.

poses, such time as, with reference to those purposes, might be deemed reasonable, beyond a life or lives in being, might be allowed. The purpose in each of those cases, was to give a third person an option, after the death of a particular tenant, to purchase the estate; and twelve months in the first case, and three months in the other, were held a reasonable time for that purpose. These cases, however, do not go the length for which they were pressed at your Lordships' bar; they do not necessarily warrant an inference that a term of twenty-one years, for which no special or reasonable purpose is assigned, would also be allowed; and I do not state them as the foundation upon which our opinion mainly depends. They are only important as establishing that a life or lives in being, is not the limitation; that there are cases in which it may be exceeded. *Taylor v. Biddal* (k), 1677, is the first instance we have met with in the books, in which so great an excess as twenty-one years after a life or lives in being was allowed, and that was a case of infancy. It was a limitation to the heirs of the body of Robert Warton, and their heirs, as they should attain the respective ages of twenty-one, there might be an interval therefore, of twenty-one years between the death of Robert, till which time no one could be heir of his body, and the period when such heir should attain twenty-one, till which time the estate was not to vest; and that limitation was held good by way of executory devise. That, however, was a case of infancy, and it was on account of that infancy, that the vesting was postponed. This case was followed by, and was the foundation of, the decision in *Stephens v. Stephens* (l). That was a case of infancy also. The executory devise there was, "to such other son of the body of my daughter, Mary Stephens, by my son-in-law, Thomas Stephens, as shall happen to attain the age of twenty-one years, his heirs and assigns for ever; and the Judges of the Court of King's Bench certified that the devise was good. The certificate in that case is peculiar; it refers to *Taylor v. Biddal*, and says, "that however unwilling they might be to extend the rules laid down for executory devises, beyond the rules generally laid down by their predecessors, yet, upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years; and considering that the power of alienation would not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which could not reasonably be said to extend to a perpetuity; and considering that such construction would make the

(k) 2 Mod. 289.

(l) Cas. t. Talb. 232.

testator's whole disposition take effect, which otherwise would be defeated; they were of opinion, that that devise was good by way of executory devise." This also was a case of infancy; it was on account of that infancy that the vesting of the estate was postponed; and though, under that limitation, the vesting of the estate might be delayed for twenty-one years after the deaths of Thomas and Mary Stephens, it did not follow of necessity that it would; and it might vest at a much earlier period. These decisions, therefore, do not distinctly or necessarily establish the position, that a term in gross for twenty-one years, without any reference to infancy, after a life or lives *in esse*, will be good by way of executory devise; but there is nothing in them necessarily to confine it to cases of infancy; the contemporaneous understanding might have been, that it extended generally to any term of twenty-one years; and there are some authorities which lead to a belief that such was the case. In *Goodtitle v. Wood* (m), Lord Chief Justice Willes discusses shortly the doctrine of executory devises, and notices their progress of late years. He says, "The doctrine of executory devises, has been settled; they have not been considered as bare possibilities, but as certain interests and estates, and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities. At first it was held that the contingency must happen within the compass of a life or lives in being or a reasonable number of years; at length it was extended a little further, viz. to a child *en ventre sa mère* at the time of the father's death; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience; and the rule has, in many instances, been extended to twenty-one years after the death of a person in being; as in that case, likewise, there is no danger of a perpetuity." And in citing this passage in *Thellusson v. Woodford* (n), Lord Chief Baron Macdonald prefaces it by this eulogium: "The result of all the cases is thus summed up by Lord Chief Justice Willes with his usual accuracy and perspicuity." He does indeed afterwards say (o), after noticing *Long v. Blackhall* (p), "the established length of time, during which the vesting may be suspended, is during a life or lives in being, the period of gestation and the infancy of the posthumous child," and that rather implies that he thought

(m) Willes, 213; S. C. 7 Term Rep. 103, n.
(n) 1 N. R. 388.

(o) 1 N. R. 393.
(p) 7 Term Rep. 100.

the rule was confined to cases of minority. This opinion of Willes, C. J., though not published till 1797, was delivered in 1740; and in the minds of those who heard it, or of any who had the opportunity of seeing it, might raise a belief that there were instances in which a period of twenty-one years after the death of a person *in esse* without reference to any minority had been allowed; and though there be no such case reported it does not follow that none such was decided. In *Goodman v. Goodright* (g) is this passage: "Lord C. J. Mansfield says, it is a future devise to take place after an indefinite failure of issue of the body of a former devisee, which far exceeds the allowed compass of a life or lives in being and twenty-one years after, which is the line now drawn, and very sensibly and rightly drawn." This was published in 1766; and whether the last approving paragraph was the language of Lord Chief Justice Mansfield or the reporter it was calculated to draw out some contradiction or explanation, if that were not generally understood by the profession as the correct limitation. In *Buckworth v. Thirkell* (r) Lord Mansfield says, "I remember the introduction of the rule which prescribes the time in which executory devises must take effect, to be a life or lives in being and twenty-one years afterwards." In *Jee v. Audley* (s) Lord Kenyon (Master of the Rolls) says, "The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years, or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the *Duke of Norfolk's Case* (t) to the present time; it is grown reverend by age, and is not now to be broken in upon." In *Long v. Blackall* (u) the same learned Judge says, "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations; and the Courts have said that the estates shall not be unalienable by executory devises for a longer time than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail; and, until the person to whom the last remainder is limited is of age, the estate is unalienable. In conformity to that rule the Courts have said, so far we will allow executory devises to be good." And, after referring to the *Duke of Norfolk's Case*, he concludes, "It is an established rule that an executory

(g) 2 Burr. 879.

(r) 3 Bos. & Pul. 654, n.; S. C. 10 B. Moore, 238, n.

(s) 1 Cox, 325.

(t) 3 Ch. Cas. 1.

(u) 7 Term Rep. 102.

devise is good, if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." In *Wilkinson v. South* (x) Lord Kenyon says, "The rule respecting executory devises is extremely well settled, and a limitation by way of executory devise is good, if it may (I think it should be *must*) take place after a life or lives in being and within twenty-one years, and the fraction of another year afterwards." We would not wish the House to suppose that there were not expressions in other cases about the same period from which it might clearly be collected that minority was originally the foundation of the limit, and to raise some presumption that the limit of twenty-one years after a life in being was confined to cases in which there was such a minority; but the manner in which the rule was expressed in the instances to which I have referred, as well as in text writers, appears to us to justify the conclusion, that it was at length extended to the enlarged limit of a life or lives in being and twenty-one years afterwards. It is difficult to suppose that men of such discriminating minds, and so much in the habit of discrimination, should have laid down the rule as they did, without expressing minority as a qualification of the limit,—particularly when in many of the instances they had minority before their eyes,—had it not been their clear understanding, that the rule of twenty-one years was general without the qualification of minority. Mr. Justice Blackstone, in his Commentaries (y), puts as the limits of executory devises that the contingencies ought to be such as may happen within a reasonable time, as within one or more lives in being or within a moderate term of years; for Courts of Justice will not indulge even wills so as to create a perpetuity. The utmost length that has been hitherto allowed for the contingency of an executory devise, of either kind, to happen in, is that of a life or lives in being, and twenty-one years afterwards; as when lands are devised to such unborn son of a *feme covert* as shall first attain twenty-one, and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother, and the subsequent infancy of her son; and this has been decreed to be a good executory devise. Mr. Fearne, in his elaborate work upon executory devises, lays down the rule in the same way: "An executory devise to vest within a short time after the period of a life in being is good;" as in *Lloyd v. Carew*, which he states, and *Marks v. Marks*: and he says, "The Courts, indeed, have gone so

(x) 7 Term Rep. 558.

(y) 2 Bl. Comm. 174, 16th ed.

far as to admit of executory devises limited to vest within twenty-one years after the period of a life in being;" as in *Stephens v. Stephens*, *Taylor v. Biddal*, *Sabbarton v. Sabbarton* (z), all of which he states, and in all of which the vesting was postponed on account of minority only; and then he draws this conclusion, "That the law appears to be now settled, that an executory devise, either of a real or personal estate, which must in the nature of the limitation vest within twenty-one years after the period of a life in being, is good; and this appears to be the longest period yet allowed for the vesting of such estates." The instances put, all instances of minority, might certainly have suggested that it was in cases of minority only that the twenty-one years were allowed; but, by stating it generally as he did, he must have considered twenty-one years generally, independently of minority, as the rule. The same observation applies to Mr. Justice Blackstone. That such was Mr. Fearne's understanding may be collected from many other passages in his book; but from none more distinctly than in the third division of his first chapter on executory devises (a), where, after having mentioned as the second sort of executory devises those where the devisor gives a future estate, to arise upon a contingency, without at present disposing of the fee; and after putting several instances, he then concludes the division thus: "And the case of a limitation to one for life, and from and after the expiration of one day (or any other supposed period, not exceeding twenty-one years, we may suppose), next ensuing his decease, then over to another, may be adduced as an instance of the call for the latter part of the extent to which I have opened the second branch of the general distribution of executory devises." And in his third chapter (b) he begins his eighth division, with this position: "It is the same (that is, that an executory devise is not too remote) if the dying without issue be confined to the compass of twenty-one years, after the period of a life in being." And in the eighth division of the fourth chapter (c) he says, "It seems now to be settled, that whatever number of limitations there may be after the first executory devise of the whole interest, any one of them that is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding limitations, which would carry the whole interest, happens to vest." The opinion of Mr.

(z) Cas. t. Talb. 55, 245.
 (a) 9th ed., 399, 401.

(b) Page 470.
 (c) Page 517.

Fearne is continued in the different editions, from the period when his work was first published in 1773, down to the present time ; but, upon that expression which occurs in *Thellusson v. Woodford* (d), showing that a doubt existed in the mind of Lord Alvanley, that doubt is introduced into a subsequent edition, for the purpose of consideration ; but it does not appear to me, from anything expressed by his great and experienced editor, or in any note of his, that he thought the rule laid down by Mr. Fearne was not the right and correct rule ; but instead of that, he seems to have intimated, that his opinion was in conformity with it ; because he gives extracts from what Mr. Hargrave, who agrees with Mr. Fearne, had said upon the subject, as if the inclination of his opinion was that Mr. Fearne was right, and that the unqualified rule of twenty-one years was correct. At length, in *Beard v. Westcott* (e), the question whether an executory devise was good, though it was not to take effect till the end of an absolute term of twenty-one years after a life in being at the death of a testator, without reference to the infancy of the person intended to take, was distinctly and pointedly put by Sir W. Grant, the then Master of the Rolls ; and the Court of Common Pleas certified that it was. The point, though necessarily involved in that will, was not prominently brought forward, either upon the will itself, or upon the first of the two cases that was stated ; and lest it might have escaped the notice and consideration of the Court of Common Pleas, it was made the subject of an additional statement to that Court. The first certificate was in November, 1812 ; the next in November, 1813 ; and the Judges who signed them were Sir James Mansfield, Mr. Justice Heath, Mr. Justice Lawrence, Mr. Justice Chambre, and Mr. Justice Gibbs, men of great experience, and some of them very familiar with the law of executory devises. Those certificates stood unimpeached until 1822, when the same case was sent by Lord Eldon to the Court of King's Bench, and that Court certified that the same limitations which the Common Pleas had held valid, were void, as being too remote ; but the foundation of their certificate was, that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void, which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation ; and because that was a limitation too remote, the others were

(d) 4 Ves. 387.

(e) 5 Taunt. 393.

considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but, when it became totally immaterial in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at, that that point was not so fully considered as it might otherwise have been. Upon the direct authority, therefore, of the decision of the Court of Common Pleas, in *Beard v. Westcott*, and the *dicta* by L. C. Justice Willes, Lord Mansfield and Lord Kenyon, and the rules laid down in Blackstone and Fearn, we consider ourselves warranted in saying that *the limit is a life or lives in being, and twenty-one years afterwards without reference to the infancy of any person whatever*. This will certainly render the estate unalienable for twenty-one years after lives in being, but it will preserve in safety any limitations which may have been made upon authority of the *dicta* or text writers I have mentioned; and it will not tie up the alienation an unreasonable length of time.

Upon the second and third questions proposed by your Lordships, whether a limitation by way of executory devise is void as too remote, or otherwise, if it is not to take effect until after the determination of a life or lives in being, and upon the expiration of a term of twenty-one years afterwards, together with the number of months equal to the ordinary or longest period of gestation, but the whole of such years and months to be taken as a term in gross, and without reference to the infancy of any person whatever, born or *en ventre sa mère*, the unanimous opinion of the Judges is, that such a limitation would be void as too remote. They consider *twenty-one years as the limit, and the period of gestation to be allowed in those cases only in which the gestation exists*.

The LORD CHANCELLOR (*Lord Brougham*).—I shall move your Lordships to concur in the opinions expressed by the learned Baron, as the unanimous resolutions of the Judges. The two last questions were put with a view to comprehend more fully the question argued at the bar, and to see the origin of the rule. That rule was originally in-

introduced in consequence of the infancy of parties ; but whatever was its beginning it is now to be taken as established by the *dicta* of the Judges from time to time. A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew* (f) settled the rule, for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers. It is impossible to read the passages read by the learned Baron from Mr. Fearn's book without seeing that it was the settled opinion of that eminent person, that twenty-one years might be taken absolutely. The able editor of his book was of the same opinion, and Mr. Justice Buller's opinion was stated by him and examined. Mr. Butler makes it a question of separate consideration, and treated the subject as Mr. Fearn had done. The opinion of Lord Mansfield was the same, and the doctrine is not weakened by what Lord Kenyon is stated to have said in *Long v. Blackall* (g). In the opinion of all the rule was clearly confined to twenty-one years, as the period now understood. It was, however, necessary to state the first question for the opinion of the Judges, and they have not shrunk from the consideration of it. It was also right to have put the other two questions, to which the learned Judges also applied themselves, and they have excluded the period of gestation beyond the term of twenty-one years, except where the gestation actually exists. If your Lordships be of the same opinion you will affirm the judgment of the Court below and dispose of this case. The rule will then be, that a limitation will not be too remote if the vesting be suspended for twenty-one years beyond a life or lives in being, but that beyond that period it would.

The judgment of the Court below was affirmed.

Cadell v. Palmer, is the leading authority on the important rule against Perpetuities, because in that case its limits, not before in all respects precisely laid down, may be considered as having been finally ascertained and marked out, by the high authority of the House of Lords.

The term "rule against perpetuities" does not very happily describe what is meant by it; for it not only aims against persons rendering property absolutely inalienable, so that it should always remain in a certain line or family, but also against property being rendered inalienable beyond a certain period.

(f) Show. Parl. Cas. 137.

(g) 7 Term Rep. 100.

It is not intended in this note to trace the history of the rule, as this is done with great accuracy by Mr. Hargrave in his argument in *Thellusson v. Woodford* (4 Ves. 247; 2 Jur. Arg. 7), and by Mr. Lewis in his learned Treatise upon Perpetuities; suffice it to say that some of the earliest attempts at making land inalienable were the restraints endeavoured to be placed upon the tenants in tail, to prevent them from suffering recoveries or levying fines, but without success. "And it was observed," says Coke, "that these perpetuities were born under some unfortunate constellation; for they, in so great a number of suits concerning them in all the Courts in Westminster, never had any judgment given for them, but many judgments given against them. And from these fettered inheritances the freeholds of the subject are thereby set at liberty, according to their original freedom." 10 Rep. 320.

Thus it has been decided, that the power of a tenant in tail to suffer a recovery or alien could not be restrained by any condition (*Sonday's Case*, 9 Rep. 128; Co. Litt. 233 b. 234 a), proviso (*Corbet's Case*, 1 Rep. 83; *Mildmay's Case*, 6 Rep. 40; *Pierce v. Win*, 1 Vent. 321; *Mary Portington's Case*, 10 Rep. 35), limitation (*Foy v. Hynde*, Cro. Jac. 696), custom (*Taylor v. Shaw*, Carter, 6, 22), recognizance or statute (*Poole's Case*, cited Moore, 810), or covenant (*Collins v. Plummer*, 1 P. Wms. 104). And in more recent times a trust in a deed creating estates tail, after any contract for alienation, to raise a sum of money for the persons next in the course of limitation, has been held void as tending to a perpetuity. *Mainwaring v. Baxter*, 5 Ves. 458.

The principle upon which all these cases proceeded is this, that the power of alienation by the proper mode, viz. a recovery, was an inseparable incident to an estate tail, and could not therefore by any means, either direct or indirect, be barred or restrained. And now fines and recoveries are abolished any attempt to restrain a tenant in tail from disentailing his property, according to the provisions of the Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74), would be equally unsuccessful.

Although the efforts to render land *absolutely* inalienable were thus one by one defeated, the ingenuity of lawyers has, almost down to the present period, been taxed, by the vanity or caprice of the owners, to tie up or to render land inalienable, *for as long a period* as the law would allow—a period which, as we have before observed, has only recently been finally determined.

Another attempt at creating perpetuities by means of successive life interests was also defeated. Thus in the case of *The Duke of Marlborough v. Godolphin*, 1 Eden's Rep. 404, the testator, John Duke of Marlborough, devised his real estates to trustees, in trust for several persons for life, with remainders to their first and other sons in tail male successively; but directed his trustees, upon the birth of every son of each tenant for life, to revoke the uses before limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. It was held by Lord Keeper

Henley, that the clause of revocation and resettlement, as tending to a perpetuity, and repugnant to the estate limited, was void and of no effect.

Where, however, an executory trust, if carried literally into effect, would be void for illegality by infringing the rule against perpetuities, the Court of Chancery, in order to carry the testator's intentions as far as possible into effect, or as it is termed *cy près*, will direct a settlement to be made as strictly as the law will permit. Thus in *Humberston v. Humberston* (1 P. Wms. 392; *S. C.* 2 Vern. 737; Prec. Ch. 455), where there was a devise to a corporation, in trust to convey to A. for life, and afterwards, upon the death of A., to his first son for life, and so to the first son of that first son for life, with remainder, in default of issue male of A., to B. for life, and to his sons and their sons in the same manner, Lord Cowper said, that though the attempt to create a perpetuity was vain, yet, so far as was consistent with the rules of law, it ought to be complied with; and he directed that all the sons already born should take estates for life, with limitations to their unborn sons in tail. See *Williams v. Teale*, 6 Hare, 289, and cases there cited.

The cases, however, upon the subject of perpetuities, in later times, have arisen principally out of springing or shifting uses, and executory devises or trusts, deriving their origin from the Statute of Uses (27 Hen. 8, c. 10) and the Statute of Wills (32 Hen. 8, c. 5, and 34 & 35 Hen. 8, c. 5), which were not capable of being barred or destroyed by the owner of the prior estate (1 Sand. Uses, 145, 153; *Kent v. Steward*, Cro. Car. 358; *Smith v. Warren*, Cro. Eliz. 688; *Pells v. Brown*, Cro. Jac. 590; and post, *Doe d. Cadogan v. Enart*, 7 Ad. & Ell. 647); and consequently the property could not be aliened until the gift over took effect. Suppose, for instance, a person by will devised land to A. and his heirs, with a proviso that on the failure of the issue of B. it should go over to C. Now in the case supposed, A. could in no way bar or destroy the executory devise over to C.; and, as long therefore as any issue of B. was in existence, it followed that the estate was inalienable.

To obviate the inconvenience which would arise from property being tied up for such a period, the rule against perpetuities has at length laid down as the extreme limit beyond which property cannot be rendered inalienable, viz. *a life or lives in being, and twenty-one years afterwards, without reference to the infancy of any person whatever, and that a person en ventre sa mère is, for the purposes of the rule, considered as in existence.*

Thus a child *en ventre sa mère* is considered as a life in being, and with reference to the term of twenty-one years, though born after its expiration, he will be considered as though he were in existence during the whole period of gestation.

Persons not bearing in mind that an infant *en ventre sa mère* is to be considered as if he were in esse, fell into the error of supposing, that in addition to a life or lives in being, a term of twenty-one years, together with

a number of months equal to the ordinary or longest period of gestation, might be added. The answer, however, of the Judges to the second and third questions put to them by the House of Lords in the principal case, placed the question upon a true foundation, viz. that after the life or lives *in being*, the *twenty-one years is the limit, and the period of gestation is to be allowed in those cases only in which the gestation exists.*

Although a life or lives be not taken as part of the period, the other portion, viz. the twenty-one years, cannot be exceeded. Thus in *Palmer v. Holford*, 4 Russ. 403, where a testator gave bank stock to trustees to accumulate, and to assign the accumulated fund to the children of his son Charles who should be living *twenty-eight years from his decease*, other than an eldest or only son, as tenants in common, and if but one such child then the whole to such child, and in case no such child or children other than and except an eldest or only child should be living at the expiration of twenty-eight years, then over. It was held by Sir J. Leach, M. R., that the bequest was void. "The expressed intention," said his Honor, "is, that all the children of Charles, other than an eldest son, should take, who were living at the expiration of twenty-eight years, and that no person should take before that period. If Charles had such children born to him at any time within seven years from the testator's death, then the vesting of the interests of such children who were unborn at the death of the testator *would have been suspended for more than twenty-one years, and the gift therefore is too remote and void*; and the gifts over, not being to take effect until after the same period, which is too remote, are necessarily void also." See also *Speakman v. Speakman*, 8 Hare, 180.

But although property be limited so as not to vest until after the expiration of twenty-one years, if the limitation be to *persons living at the testator's death*, it will not be void on account of remoteness. Thus in *Lachlan v. Reynolds*, 9 Hare, 796, where the testator directed that his executors, *when thirty years were expired*, should order all his property, both freehold and leasehold, to be sold, and two-thirds thereof to be divided amongst his children living at that period, *or* to their heirs. Sir George Turner, V. C., was of opinion that the word "*or*" ought to be construed as "*and*." His Honor observed, "It appears to me, that this amounts to no more than a gift to such of several persons who may be living at the death of the testator as shall be living at the end of thirty years. The legacies are vested at the termination of a life in being at the death of the testator; and they are not, therefore, liable to any objection on the ground of remoteness."

It has also been determined that the rule is applicable to limitations of personal as well as of real estate, and is to be followed in equity as well as at law. 2 Jur. Arg. 51; Lewis, Perpet. 169.

Before examining the application of the rule to various classes of cases, it may be mentioned that the governing principle (which will hereafter be abundantly illustrated) is, that *possible*, and not *actual*, events are alone

considered, and that consequently no limitation will be good, unless it *necessarily*, if at all, takes effect within the time allowed by the rule; nor will any gift be valid if it *possibly* may include objects too remote.

A gift, moreover, must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, otherwise the gift will be void. *Curtis v. Lukin*, 5 Beav. 147.

The period from which the time allowed by the rule begins to run, when the limitations are created by deed, is its date (*Lewis, Perpet.* 171); when by will, is the death of the testator. *Tregonwell v. Sydenham*, 3 Dow. 194, 215; *Ibbetson v. Ibbetson*, 10 Sim. 515; *Vanderplank v. King*, 3 Hare, 17; *Faulkner v. Daniel*, Ib. 216; *Williams v. Teale*, 6 Hare, 251; *Rye's Settlement*, 10 Hare, 112; *Peard v. Kekewich*, 15 Beav. 173; *Southern v. Wollaston*, 16 Beav. 166, 276; *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 145; *Dungannon v. Smith*, 12 C. & F. 546. Sed vide *Harris v. Davis*, 1 Coll. 416; *Andrew v. Andrew*, Ib. 690.

Rule as applicable to Limitations after a Failure of Issue or Heirs.

An executory devise, or springing or shifting use to arise after an *indefinite failure of issue* will be void as against the rule.

Suppose, for instance, there be a gift to A. and his heirs, with a limitation over, on the failure of the issue of B. a stranger, to C. and his heirs; now it is evident that the issue of B. might not fail for centuries, and during that period the property would be inalienable, inasmuch as A. could not, in case it were an executory devise, or a shifting or springing use, bar or destroy the estate limited to C., it is therefore void as too remote. See *Badger v. Lloyd*, 1 Ld. Raym. 526; 1 Salk. 233.

Again, where the general failure of issue is that of a person having a prior life estate, unless it be restricted either to issue living at his death, or he takes by implication an estate tail, the gift over will be void.

Questions of considerable difficulty often arise in determining whether words importing a failure of issue mean a *general* failure, or a failure of issue *at the death* of such person. (See *Forth v. Chapman*, post, where this question is fully discussed.) If the former construction prevail, then any gift dependent upon, or to take effect after it, will (with the exceptions hereafter mentioned) be void; if the failure of issue be restricted to issue living at the death, then the gift over will be good as being clearly within the rule. See and consider now 1 Vict. c. 26, s. 29.

It has been before stated that there are some exceptions to the rule as to the effect of a limitation over after a general failure of issue; perhaps a more accurate expression would have been, that the Courts, being desirous of carrying out the intention of the testator as far as possible, and, in order to render what would be void as an executory devise over, after a general failure of

issue, valid as a remainder dependent upon an estate tail, have given, when they could, an estate tail by implication to the prior devisee, upon which a valid remainder over may be limited, instead of an estate in fee determinable by an executory gift over on a general failure of issue, which as we have before seen is bad. Suppose, for instance, an estate be devised to A. and his heirs, but if he die without heirs of his body, or without issue, to B., if this were construed as an estate in fee in A., with an executory devise over to B. on a general failure of issue, the gift over to B. would be void as too remote; but the Courts, considering that it was the intention of the testator to give some benefit to the issue of A. (who would take nothing if he had the fee) by implication, hold him to be entitled to an estate tail, under which, unless it be barred by him, his issue will take, while the limitation over to B. is valid as a remainder after the estate tail. See *Doe d. Ellis v. Ellis*, 9 East, 383.

Upon the same principle, where land is devised to A. for life, or indefinitely, with a limitation over to B. upon A.'s dying without issue, by the operation of the rule in *Shelley's Case*, A. takes an estate tail, so that the limitation over to B., which would have been void, as an executory devise after a general failure of issue will be valid as a remainder, after the estate tail of A. See *Shelley's Case*, and note, post.

In deeds an estate tail will sometimes be raised by implication, but as they are construed with greater strictness than wills, the word "heirs" is essential to such construction. Thus, if in a deed there be a conveyance to A. and his heirs, with a limitation over on his dying without heirs of his body, or without issue of his body, to the use of B., in such cases A. will take by implication an estate tail, and B. a remainder expectant thereon; whereas if A. had taken an estate in fee, with a shifting or springing use over to A., limited after a general failure of issue, it would be void as too remote. 2 Prest. Estates, 484, 504; *Scrape v. Rhodes*, Com. 54.

A conveyance to A. simply, with a limitation over to the use of B. on the death of A. without heirs of his body, will give A. an estate tail, with a remainder over to B. Lewis, Perpet. 180.

But if in deeds the word "heirs" does not occur in the gift to the first taker, either actually or referentially, an estate tail will not be created by such words as would in the case of a will confer such an estate by implication. 2 Prest. Estates, 481.

Although there be a gift over, after a general failure of issue, if it be so limited that it must necessarily take effect during a life or lives in being, and twenty-one years after, it needs no authority to show that it will be equally valid, as being within the limits of the rule, as if the failure of issue had been restricted to the death of the first taker. Lewis, Perpet. 188.

Where a person is entitled to an estate in reversion expectant upon an estate tail, if he devise the estate after the failure of the issue who would take under the entail, the devise will be valid, there being no danger of a

perpetuity in such a case, inasmuch as the estate tail can at any time be barred, and the estate rendered alienable. Thus in *Badger v. Lloyd*, 1 *Ld. Raym.* 523; 1 *Salk.* 232; a father being entitled under a settlement to the reversion in fee of an estate expectant, upon an estate in tail male in his son John, by his will devised the estate *from and after* his son John's death without issue male to another son. An objection was taken, that the estate devised by the will was executory and void. But it was answered, that it was not an executory but an immediate devise; and the words "*from and after*," were only a declaration when it should take effect in possession. . . . If John had not had any estate tail in the land, but the devise had been *after the death of a stranger without issue*, that would have been an executory devise, and void by reason of the remoteness of the possibility; but there it was limited after the determination of the particular estate. See also *Lytton v. Lytton*, 4 *Bro. C. C.* 441.

But where the line of issue on whose failure the reversion is devised does not coincide with that upon the failure of which the reversion is expectant, the devise will be too remote, and consequently void. Thus in *Lady Lanesborough v. Fox*, *Ca. t. Talb.* 262, the testator being entitled to the reversion in fee, of lands settled on the marriage of his son, on his son for life with remainder to his first and other sons by M. his wife successively in tail male, and, in default of such issue, to the use of the heirs male of the body of the son, remainder to the right heirs of the testator, by his will devised the hereditaments comprised in the settlement, *on failure of issue of the body of his son*, and *for want of heirs male of his own body*, to his daughter and the heirs of her body; it was held by the House of Lords, reversing the decision of the Exchequer Chamber in Ireland, that the daughter took no estate whatsoever, and that the devise to her was absolutely void, as being upon too remote a contingency. See also *Banhes v. Holme*, 1 *Russ.* 304, n.; *Briston v. Boothby*, 2 *S. & S.* 465.

The Court, however, is inclined in such cases to construe words used by the testator importing an indefinite failure of issue to mean a failure of the issue entitled under the entail, so as to support the devise as a mere disposition of the reversion. See *Jones v. Morgan*, 3 *Bro. P. C.* 323, *Toml. Ed.*; *Lytton v. Lytton*, 4 *Bro. C. C.* 441; *Sanford v. Irby*, 3 *B. & Ald.* 654; *Egerton v. Jones*, 3 *Sim.* 409.

Another exception it seems to the rule, by which limitations over on a general failure of issue are too remote, is where the interest in the property limited is of such a nature that it must necessarily determine within the time allowed by the rule, viz. a life or lives in being, and twenty-one years after. *Butler's note to Fearn*, *C. R.* 500; *Lewis, Perpet.* 673, and cases there cited.

Again, where there is a limitation over, by executory devise to take effect in default of *heirs* of a person, it will be invalid as too remote, unless by implication an estate tail can be given to the prior devisee. Thus in *Grumble v. Jones*, *Willes*, 166, n., where a testator devised lands to his daughter for life, remainder to A. the eldest son of his daughter, *and his*

heirs, and for want of such heirs remainder to the right heirs of J. S. who was his daughter's husband. It was the clear opinion of the Court that A. took an estate in fee, and that the limitation over was void. "For the limitation was express to A. and his heirs, and the remainder over for want of such heirs does not necessarily show that the deviser intended that the estate should pass over for want of *heirs of his body*, for he might mean for want of *heirs in fee*; and it was but reasonable that the common and legal construction of words should be taken where it did not appear from a necessary or plain implication that the intent of the deviser was otherwise. If, therefore, a limitation in a will be to the eldest son of the deviser and his heirs, and for want of such heirs remainder to the second son, who if the first son die without issue is next heir both to his father and brother, in this case the limitation to the eldest son must be understood to be an estate tail; because the word '*heirs*' cannot be taken to signify '*heirs in fee*,' when the limitation over for want of such heirs is to the next heir in fee." *S. C. 2 Eq. Ca. Abr.* pl. 300, 15; 11 *Mod.* 207; *Salk.* 238, nom. *Aumble v. Jones*. See also *Attorney-General v. Gill*, 2 P. Wms. 369; *Griffiths v. Grieve*, 1 J. & W. 31.

And not only will an estate tail be implied when the devisee over is heir in the lineal line, but also when he is a relation however remote in the collateral line; and since 3 & 4 Will. 4, c. 106, if he be a relation in the ascending line, or by the half-blood, in fact when he is capable of inheriting from the prior devisee; because it would be absurd to suppose that the testator intended the gift over to take effect to a person upon an event which must include his own death. (See *Parker v. Thacker*, 3 Lev. 70; *Tyte v. Willis*, Ca. t. Talb. 1; *Doe d. Hatch v. Bluck*, 6 Taunt. 485; *Simpson v. Ashworth*, 6 Beav. 412.) And where there was a gift over to several, in default of heirs of the first devisee, one of whom was not, but the others were, capable of inheriting from him, it was held that he took an estate tail. *Harris v. Davis*, 1 Coll. 416.

As we have before seen, where there is a limitation over after an estate tail, inasmuch as the tenant in tail, by resorting to the usual mode of barring the estate tail, can defeat the limitation over, it does not come within the danger of a perpetuity, and is therefore valid, as where there was a proviso in a will by which one estate tail was made to cease, and go over to another person upon the tenant becoming seised of other estates. "No rule of law," said Sir Lloyd Kenyon, M. R., "is contradicted by it; and if no recovery were suffered, it might take place at any distance of time. I might as well be told that an estate tail is an illegal estate, because it may endure for ever." *Nicolls v. Sheffield*, 2 Bro. C. C. 215; see also *Carr v. Earl of Erroll*, 6 East, 58; *Earl of Scarborough v. Doe d. Saville*, 3 Ad. & Ell. 897.

Where a term of years is limited immediately after an estate tail, upon a failure of the issue of the persons taking under the entail, the term will not be too remote, as it may be barred by the tenant in tail. Thus in *Morse v.*

Lord Ormonde, 5 Madd. 99, a testatrix by will limited certain estates to her daughter Lady Ormonde for life, remainder to her first and other sons successively in tail male, remainder to her daughters as tenants in common in tail general; and if there were one only daughter, then to her in tail general; "and in default of all such issue" of her said daughter, to trustees for a term to raise certain legacies. It was held by Sir John Leach, V. C., that the "failure of issue" was to be construed as a failure of such issue as were included in the limitation of the estate, and that therefore the bequest of the legacies was not too remote. This decision was afterwards affirmed by Lord Eldon, 1 Russ. 382. See also *Eales v. Conn*, 4 Sim. 65; *Faulkner v. Daniel*, 3 Hare, 199; *Bristow v. Boothby*, 2 S. & S. 465.

Where, however, the term of years is *precedent* to the estate tail, and is to arise after a general failure of issue, as it cannot be barred by the tenant in tail, it will be void, as too remote. Thus in *Case v. Drosier*, 2 Keen, 764, the testator devised two estates to trustees for 500 years, and subject thereto devised one estate to A. for life, with remainder to his sons in tail male, with remainder to his daughters in tail general, with remainder to B. for life, with similar remainders to B.'s issue; and devised the other estate upon similar trusts for B. and his issue, with remainder upon similar trusts to A. and his issue. Lord Langdale, M. R., said that the inclination of his opinion was that the testator meant such issue as he had described in the former limitations; "but," added his Lordship, "whether so or not, he has directed the sums to be raised on failure of that issue. It might be at a very remote period, and there are no means by which the charges in this case could be barred; they depend on a term, and that term is *precedent* to the estates tail; so that after a recovery, there would remain a term and a trust to be performed; a trust which could not be defeated, and a term which cannot be destroyed." Lord Cottenham, in affirming the decision of the Master of the Rolls (5 My. & Cr. 246), observed, "The dying without issue would mean an indefinite failure of issue, unless confined by the provision that it must happen during the life of the survivor, which restriction this argument excludes; so that the 2,000*l.* would, upon that construction, be payable, either upon an indefinite failure of issue generally, or, at least, of the issue male, or issue of daughters who were entitled to take the estates (and I will assume that the latter is the true construction); and the appellant thereupon argues that this is only a legacy charged upon the estate upon the failure of an estate tail, which is not void for remoteness. But why is such a charge not void for remoteness? Merely because, being after an estate tail, it is barrable by recovery, as was the case in *Morse v. Lord Ormonde*; but in this case the 2,000*l.* is charged upon, or is part of, a term anterior to the estate tail, and therefore not barrable by recovery, but to be enjoyed only upon the failure of the issue male, or of the issue of daughters of one of the grandsons. There is no gift of the 2,000*l.*, except in declaring the trusts of the term, and that term would not be affected by the recovery. *Eales v. Conn* (4 Sim. 65), affirmed by the Lord Chancellor in 1831, is a

direct authority upon that point, which I have no disposition to disturb." See also *Doe d. Lumley v. Scarborough*, 3 Ad. & Ell. 897.

Previous to 8 & 9 Vict. c. 106, s. 8, some contingent remainders were liable to be destroyed by the forfeiture, surrender or merger of the preceding estate of freehold, and it has been considered by some, by analogy to the cases in which it has been held that a limitation to take effect on the determination of an estate tail is valid, because the estate tail can at any time be barred by the tenant in tail, that in like manner a contingent remainder, in other respects obnoxious to the rule against perpetuities, might be supported, because it was liable to be destroyed by the owner of the preceding estate of freehold. There does not, however, appear to be any authority for the doctrine, nor does the analogy appear to hold good, because a recovery, or what is substituted for it, is a legal and rightful act, and it may therefore be fairly presumed that a tenant in tail would, at the earliest opportunity, acquire the fee, and so acquire full dominion over the property, by which the executory limitation over is taken out of the reason of the rule against perpetuities; the destruction, however, of contingent remainders being a tortious and wrongful act, it is not to be presumed that the tenant for life will commit it, so as to take the contingent remainder out of the rule.

Thus, in the case put by an eminent writer, if freehold lands, of which the legal inheritance was in the testator, were devised to A. for life, with remainder to his eldest son who should be living at his (the son's) decease, for life, with remainder in fee to the children of such eldest son who should be living at his (the son's) decease; although A. (previous to 8 & 9 Vict. c. 106) might have destroyed all the remainders, and the eldest son might have destroyed the ultimate remainder in fee devised to his children, without being amenable either in law or equity to the persons whose estates were destroyed, such ultimate remainder would nevertheless, it is conceived, be void, on the ground of remoteness, 1 Jarm. Wills, 208; and as contingent remainders cannot now be destroyed, it is clear that such remainder would be bad.

Rule as it affects Remainders.

Considerable discussion has taken place upon the question, whether the rule against perpetuities is applicable to estates which take effect by way of remainder in the same mode as in the case of limitations by way of executory devise, or shifting or springing use. The Real Property Commissioners appear to have been of the opinion that it is not applicable. See 3 Real Prop. Com. Rep. p. 29. The same view is also taken by Mr. Williams in his able work on Real Property, and also by Lord St. Leonards in the case of *Cole v. Sewell*, 4 D. & W. 1; 2 C. & L. 344: there, by a settlement, lands were limited to trustees, to the use of the settlor for life, with remainder, subject to a term of ninety-nine years, to the use of his three daughters, for their lives, as tenants in common, with remainder to trustees, during the life of each daughter, to preserve contingent remainders, with remainder as to the share of each daughter, at her death, to the use of her first and other sons suc-

cessively in tail male, with remainder, in case of the death of any one or more of the daughters without issue male, to the use of the survivors or survivor during their or her respective lives and life, with remainder, in like manner, as to the original share, to the use of the first and other sons of such surviving daughters or daughter in tail male, with remainder, in case all the daughters should die without issue male, as to the share of each, to the use of the daughters as tenants in common in tail; and in case one or more of the daughters should die without issue, it was provided, that the share or shares of such daughter or daughters should go to the use of the daughters of such survivors or survivor, as tenants in common in tail general: the ultimate remainder was limited to the use of the settlor in fee. It was held by Lord St. Leonards (then Chancellor of Ireland), that the limitation, in case of the failure of issue generally of any of the daughters, to the daughters of the survivors or survivor, was not void for remoteness. "As to the question of remoteness," said his Lordship, "at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question, for the given limitation is either a *vested* remainder—and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time—or it is a *contingent* remainder, and then, by the rule of law, unless the event upon which the contingency depends, happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction when speaking of the laws of this country), was not known, so that while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavoured to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. If the remainder over had been regularly in default of issue male of the daughters, it would have taken effect, when and if that failure happened. Now the remainder over is in default of issue generally, but it can only take effect when and if there is a failure of issue

male, that is, upon the regular determination of the previous estate; there is no distinction in point of perpetuity between the limitations; either can only take effect at the same period. The simple distinction is, that although the event happen, the latter gift—depending upon the contingency—may never take effect; but that introduces no question of remoteness.” *Cole v. Sewell*, 2 Dru. & Warr. 28.

With regard to *Cole v. Sewell*, 4 Dru. & Warr. 1; 2 Conn. & Laws. 344, the decision in that case was affirmed in the House of Lords (2 H. L. Ca. 186); but it is clearly right, irrespective of the question as to the applicability of the rule against perpetuities to remainders, inasmuch as the remainders were limited to take place after an estate tail, which is sufficient, according to the principles before laid down, to take them, however remote, out of the dangers of a perpetuity. See also *Jack v. Fetherstone*, 2 Huds. & Br. 320.

Moreover there can be no doubt that where *legal* remainders take effect upon the determination of particular estates limited to *persons in esse*, inasmuch as they must vest, if at all, immediately upon the determination of such estates, the remainders will be valid, however remote may be the contingency upon which they are to take effect, as being within the limits of the rule. See *Wrightson v. Macaulay*, 14 Mees. & W. 214; 4 Hare, 487; *Doe d. Winter v. Perratt*, 9 C. & F. 606.

The necessity, however, that a contingent remainder should take effect immediately upon the determination of the particular estate does not in *all cases* (as Lord St. Leonards appears to have assumed in *Cole v. Sewell*) render the rule against perpetuities inapplicable to the case of contingent remainders. Thus if the legal estate be in trustees there is no rule which renders it necessary that a remainder should vest immediately upon the determination of the particular estate (*Hopkins v. Hopkins*, Ca. t. Talb. 44; 1 Atk. 581; *Chapman v. Blissett*, Ca. t. Talb.; *Monypenny v. Dering*, 7 Hare, 568; 16 Mees. & W. 418; 2 De Gex, Mac. & Gord. 145). Nor is it necessary that it should do so, when there are trustees to preserve contingent remainders. *Hopkins v. Hopkins*, 1 Atk. 588, 590.

Again, suppose there were a limitation to A. for life, remainder to A.'s eldest son (then unborn) for life, remainder to his first and other sons in tail; A. might have a son, and his son might have a son during the life of A., so that the ultimate remainder might be able to take effect (if there were no objection to it on the ground of remoteness) immediately upon the determination of the two prior life estates; but it cannot, therefore, for a moment be contended that the existence of the rule by which it is necessary that a remainder should take effect immediately upon the determination of the particular estates renders the rule against perpetuities unnecessary or inapplicable. See *Cooke v. Bowler*, 2 Keen, 54.

It seems indeed to be acknowledged, that the not very well defined rule, that there cannot be a possibility upon a possibility is obsolete, and that contingent limitations are no longer kept within due limits by it (Wms. R.

Prop. 220); but then a new rule is laid down, apparently, it is said, derived from the old rule which prohibited double possibilities, "by which an estate cannot be given to an unborn person, followed by any estate to any child of such unborn person." *Ib.*; and see *Cole v. Sewell*, 4 Dru. & Warr. 1; *Monyenny v. Dering*, 2 De Gex, Mac. & G. 168. This minor rule seems, however, to be a mere fragment of the more comprehensive rule against perpetuities, and quite insufficient to meet all the cases in which, were the rule against perpetuities not applicable, all the inconveniences of remoteness, so much dreaded in other executory limitations, would arise.

The destructibility of contingent remainders, although sometimes urged as a reason, why the rule against perpetuities does not apply to contingent remainders, is clearly insufficient, inasmuch as it cannot apply to those cases where the legal estate is vested in trustees, nor where there are trustees to preserve contingent remainders, and now by 8 & 9 Vict. c. 106, s. 8, contingent remainders are preserved. Moreover, it seems contrary to all correct principle to presume that a tortious act will be committed by the owner of the freehold. See *ante*, p. 366.

One argument against the rule being applicable to contingent remainders is founded upon the assertion, that it was introduced merely for the purpose of preventing the evil arising from perpetuities, by restraining within due bounds executory devises, and springing and shifting limitations, which were unknown to the common law, long after contingent remainders had been introduced. This argument has been well answered by a learned author. "There is nothing," he observes, "to show that the evil had been experienced in previous times; still less, that it had been tolerated. What first exhibited the danger, became the parent of the remedy; but, why is the remedy held to be restricted to that particular case, when in subsequent times, the same evil shows itself in other forms? Again, the objection is, you introduce an *ex post facto* law for remainders. It is difficult to discover in what sense this applies to remainders, which is not equally predicable of executory interests. Were not executory interests actual facts in our legal system prior to the discovery of a rule for the prevention of immoderate remoteness? What undue stretch of authority is involved in applying to remainders a necessary rule, which by the same authority and no other, and upon considerations of necessity, was imposed upon executory interests?" *Lewis, Perpet. Supp.* 125.

A conclusive argument in favour of the applicability of the rule against perpetuities to remainders, is that the doctrine of *cy près* was invented and is put in force in order to save remainders from the consequences of remoteness. This clearly was the opinion of the Court of Exchequer in *Monyenny v. Dering*, 16 Mees. & W. 428. "The doctrine of *cy près*," said Rolfe, B., "in reference to questions of perpetuity, arises where a testator gives real estate to an unborn person for life, with remainder to the first and other sons of such person in tail male, or with remainder to the first and other sons of such person in tail general, with remainder to the daughters as

tenants in common in tail, with cross remainders amongst them. In such a case, the course of succession designated by the testator is one allowed by law, but the direction that the first taker should take for life only, with remainder to his children as purchasers, is illegal as tending to a perpetuity. In such cases, the law, in order to prevent the testator's intention from being entirely defeated, has treated *his expressed intention* as divisible into two parts: first, the intention that the first taker and his issue male, or issue general, as the case may be, shall all take in succession, according to the legal course of descent; and secondly, the intention that the first taker shall take an estate for life only, and that his children shall take as purchasers. And the two intentions being thus ascertained, the Courts have treated them as independent of each other, and have said that the inability to carry into effect the second or subordinate intention, shall not defeat the primary or general intention; and such a devise has therefore been held to give an estate in tail male or in tail, as the case may be, to the first taker."

See Lewis's *Perp.* p. 408, *Supp.* p. 97, where the learned author, with great acuteness and learning, shows that the rule of perpetuities is applicable to remainders.

Where there is an executory bequest of personalty, by way of remainder, after a life interest, to a class, *some* of whom may not necessarily answer a particular description within the limits of the rule, the whole gift will be invalid, although at such period some of the class may answer such description. Thus in the leading case of *Leake v. Robinson*, 2 Mer. 363, a testator gave personal estate to trustees upon trust for A. for life, and after his decease, upon trust to assign and transfer the same to such child or children of A., being a son or sons, *who should attain the age or ages of twenty-five*, and to such child or children, who being a daughter or daughters, should attain such age or ages, or be married; and in case A. died without leaving issue living at the time of his decease, or, leaving such, they should all die before any of them should attain twenty-five, if sons, and if daughters, before they should attain such age or be married, then to pay, apply and transfer the same unto the brothers and sisters of A., upon their attaining twenty-five, if a brother or brothers, and if a sister or sisters, at such age or marriage as aforesaid. Previous to the date of testator's death, A. had five brothers and sisters born, and one subsequent to that event. A. afterwards died without issue. It was argued that although the bequest was too remote as to the child born after the death of the testator, it was valid as to those born previously, or, at any rate, as to those who were in esse at the date of the will. That if it were a direct gift at law those only would take who were capable, to the exclusion of those who were not capable of doing so, and that therefore by analogy to the law, and to carry into effect the intention of the testator as far as possible, the bequest ought in equity to be valid as to those members of the class who were in esse before the death of the testator. Sir W. Grant, M. R., however, held that the bequest was altogether void. "To induce the Court," said his Honor, "to hold the bequests in this will

to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz. a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely to grandchildren living at his death and to grandchildren born after his death." See also *Bull v. Pritchard*, 1 Russ. 213; 5 Hare, 567; *Vandry v. Geddes*, 1 Russ. & My. 203; *Ring v. Hardwick*, 2 Beav. 352; *Griffith v. Blunt*, 4 Beav. 248; *Southern v. Wollaston*, 16 Beav. 166; *Blagrove v. Hancock*, 16 Sim. 371; *Judd v. Judd*, 3 Sim. 525; *Newman v. Newman*, 10 Sim. 51; *Comport v. Austen*, 12 Sim. 218; *Boreham v. Bignall*, 8 Hare, 131; and see *Fox v. Porter*, 6 Sim. 485, where one of the class was actually named in the will. Sed vide *James v. Lord Wyndford*, 1 Sm. & Giff. 58, 59.

Where, however, distinct legacies or sums are given to individuals belonging to a class, the whole gift will not be void because the objection of remoteness is applicable to some of the members of the class. *Boughton v. James*, 1 Coll. 26; 1 H. L. Cas. 406; *Early v. Benbow*, 2 Coll. 342, 347; *Griffith v. Pownall*, 13 Sim. 393.

It seems that the rule laid down in *Leake v. Robinson* is applicable also to equitable remainders of realty devised to a class. *Walker v. Mower*, 16 Beav. 365; *Blagrove v. Hancock*, 16 Sim. 371.

But it is otherwise with regard to legal devises of real estate, by way of remainder to a class, inasmuch as when, during the continuance of the particular estate, any of the class attain the specified description, the whole remainder vests in them, subject to let in others, who afterwards attain the same description during that period, and upon the termination of particular estate, those only of the objects will take who have then attained the specified description, to the exclusion of all others who may afterwards do so. Thus in *Festing v. Allen*, 12 Mees. & W. 279, where a testator seised in fee of freehold estates, devised them to trustees to the use of his granddaughter A. for life, "and from and after her decease, to the use of all and every the child or children of her the said A., who shall attain the age of twenty-one years," to hold as tenants in common, and not as joint tenants, and to their several and respective heirs, &c. "And for want of any such issue," he directed that his trustees should stand possessed thereof, in trust as to one moiety to permit B. C. the wife of his grandson D. C. to receive the rents and profits during her life, for the maintenance and education of all and every the child or children of his said grandson D. C. lawfully begotten, who should attain the age of twenty-one years, to hold as tenants in common and not as joint tenants, and to their several and respective heirs.

And as to the other moiety, to stand possessed thereof to the use of E. for life, and from and after her decease, to the use of all and every the child or children of the said E. lawfully begotten, who *should attain the age of twenty-one years*, to hold as tenants in common in fee. The testator died in 1824, leaving him surviving his granddaughter A., the said B. C. the wife of D. C., who had four children, and the said E. who had seven children. A. married in 1825, and died in 1833, leaving three children who were *infants at the time of her death*. Some of the children of B. C. and D. attained the age of twenty-one. It was held by the Court of Exchequer, that A. was tenant for life, with a contingent remainder in fee *to such of her children as should attain twenty-one*, and as no child attained twenty-one when the particular estate determined by her death, the remainder was necessarily divested, and the children took no interest in the estate devised. It was also held, that the limitations over were divested by the same event, and that the estate vested in the heir-at-law. See also *Mogg v. Mogg*, 1 Mer. 654; *Doe d. Winter v. Perratt*, 9 C. & F. 606.

Rule as applicable to Persons or Classes of Persons answering a particular Description.

As, according to the principles before laid down, a limitation of property, in order to be valid, must take effect necessarily, if at all, within the limits of the rule, it follows that if there be a limitation to a person not in esse, which is only to vest on his attaining some particular qualification or description, not necessarily attainable, if at all, within the period of a life then in existence, and twenty-one years afterwards, it will be void ab initio, independent of future events, by which that qualification or description may have been attained within the before-mentioned period. Thus if there be a devise to the son (not in esse) of a person then living, if he should be bred a clergyman and be in holy orders (*Procter v. Bishop of Bath and Wells*, 2 H. Black. 358), or succeed to a barony (*Tollemache v. Earl of Coventry*, 2 C. & F. 611; 8 Bligh, 547; overruling *S. C. nom. Lord Deerhurst v. Duke of St. Albans*, 5 Madd. 232; and see *Tregonwell v. Sydenham*, 3 Dow. 194; *Mackworth v. Hinxman*, 2 Keen, 658; *Bacon v. Proctor*, T. & R. 31), the gift will be void, because it is uncertain whether he will attain the necessary qualification within the limits allowed by the rule. This is well illustrated and laid down in the important and leading case of *Jee v. Audley*, 1 Cox, 324; there a testator after a life interest to his wife, added, "I give 1,000*l.* unto Mary Hall, and the issue of her body lawfully begotten and to be begotten, and in default of such issue, I give the said 1,000*l.* to be equally divided between the daughters then living of John Jee and his wife Elizabeth Jee." It appeared that John Jee and Elizabeth Jee were living at the death of the testator, had four daughters and no son, and were of a very advanced age. Upon a bill being filed by the four daughters of John and Elizabeth Jee, to have the 1,000*l.* secured for their benefit in the event of Mary Hall having no children, the question arose whether the limitation to the daughters of John and Eliza-

beth Jee was not void, as being too remote, and to prove it so, it was said, that this was to take effect on a general failure of issue of Mary Hall, and though it was to the daughters of John and Elizabeth Jee, yet it was not confined to the daughters living at the death of the testator, and consequently, it might extend to after-born daughters, in which case it would not be within the limit of a life or lives in being and twenty-one years afterwards, beyond which time an executory devise is void. On the other side it was said, that though the late cases had decided, that on a gift to children generally, such children as should be living at the time of the distribution of the fund should be let in, yet it would be very hard to adhere to such a rule of construction so rigidly as to defeat the evident intention of the testator in this case, especially as there was no real possibility of John and Elizabeth Jee having children after the testator's death, they being then seventy years old; that if there were two ways of construing words, that should be adopted which would give effect to the disposition made by the testator; that the cases which had decided that after-born children should take, proceeded on the implied intention of the testator, and never meant to give an effect to words which would totally defeat such intention.

However, Sir Lloyd Kenyon, M. R., held, that the limitation to the daughters of John and Mary Jee was too remote, as it might take in after-born daughters. "Several cases," said his Honor, "determined by Lord Northington, Lord Camden and the present Chancellor, have settled that children born after the death of the testator shall take a share in these cases; the difference is, where there is an immediate devise, and where there is an interest in remainder: in the former case, the children living at the testator's death only shall take; in the latter, those who are living at the time the interest vests in possession: and this being now a settled principle, I shall not strain to serve an intention at the expense of removing the landmarks of the law; it is of infinite importance to abide by decided cases, and, perhaps, more so on this subject than any other. The general principles which apply to this case are not disputed: the limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being, and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of Judges of all times, from the time of the *Duke of Norfolk's Case* to the present; it is grown reverend by age, and is not now to be broken in upon: I am desired to do in this case something which I do not feel myself at liberty to do, namely, to suppose it impossible for persons in so advanced an age as John and Elizabeth Jee to have children; but if this can be done in one case it may in another, and it is a very dangerous experiment and introductive of the greatest inconvenience, to give a latitude to such sort of conjecture. Another thing pressed upon me, is to decide on the events which have happened; but I cannot do this without overturning very many cases. The single question before me is, not whether the limitation is good in the events which have happened, but whether it was good in its creation; and if it were not, I cannot make it so. Then must this limitation, if at all, necessarily take place within the limits prescribed by law?

The words are "in default of such issue, I give the said 1,000*l.* to be equally divided between the daughters then living of John Jee and Elizabeth his wife." If it had been to "daughters now living," or, "who should be living at the time of my death," it would have been very good; but as it stands, this limitation may take in after-born daughters; this point is clearly settled by *Ellison v. Airey* (and the effect of law on such limitation cannot make any difference in construing such intention). If then this will extended to after-born daughters, is it within the rules of law? Most certainly not, because John and Elizabeth Jee might have children born ten years after the testator's death, and then Mary Hall might die without issue fifty years afterwards; in which case it would evidently transgress the rules prescribed. I am of opinion, therefore, though the testator might possibly mean to restrain the limitation to the children who should be living at the time of the death, I cannot, consistently with decided cases, construe it in such restrained sense, but must intend it to take in after-born children. This, therefore, not being within the rules of law, and as I cannot judge upon subsequent events, I think the limitation void." See also *Hodson v. Ball*, 14 Sim. 558.

Again, where leaseholds or chattels personal are vested in trustees upon trusts corresponding with land in strict settlement, but so that they are only to vest in a tenant in tail in possession of the age of twenty-one, the period of vesting will be too remote; and it is immaterial that the intermediate rents and profits of the leaseholds are given to persons answering one of these descriptions, viz. that of tenant in tail in possession, until a person answering to the other description, viz. that of being of the age of twenty-one years, comes into existence. Thus in *Ibbetson v. Ibbetson*, 5 My. & Cr. 26, a testator being under his marriage settlement seised of the reversion of an estate, expectant on his decease without issue male, devised it to his brother for life, with remainder to his first and other sons in tail male, with divers remainders over, and he bequeathed chattels to trustees in trust to permit the same to be used and enjoyed by the person, and persons who, for the time being, should be entitled to the possession of his estate, *until a tenant in tail, of the age of twenty-one years, should be in possession of his estate*, under his marriage settlement or his will, and then they were to go to such tenant in tail. The testator's brother had a son born at the date of the will, who, at the death of his father the tenant for life, had attained twenty-one years of age. It was held, nevertheless, by Lord Cottenham, C., affirming the decision of Sir L. Shadwell, V. C. (reported 10 Sim. 495), that the gift of the chattels to the first tenant in tail of the age of twenty-one was too remote. "There might," said his Lordship, "be successive tenancies in tail, lasting for any number of years, without any one tenant in tail in possession attaining twenty-one; and as the estate could not remain suspended, if such contingency should not happen within the period limited by the rule of law, so the possibility of such contingency not happening within the limited period renders the gift void, although the contingency has, in fact, happened within that period."

In the very important and much-discussed case of *Lord Dungannon v. Smith*, 12 C. & F. 546, Lord Dungannon gave his leasehold estates to trustees in trust for his grandson Arthur, for life, and after his decease to *permit* such person, who for the time being would take by descent as heir male of the body of his grandson, to take the profits thereof *until some such person should attain the age of twenty-one years, and then to convey the same unto such person so attaining the age of twenty-one years*, his executors, administrators and assigns, with executory gifts over. Upon a bill filed by the next of kin of the testator claiming the leaseholds, it was held by the Lord Chancellor and Master of the Rolls of Ireland (1 Flan. & K. 639; 1 Dru. & Warr. 543, n.), that the property was undisposed of in consequence of the remoteness of the bequest. From this decision the present Lord Dungannon, who was the eldest son of the testator's grandson Arthur, and *who had attained twenty-one in his father's lifetime*, appealed. The case was discussed on both sides, as Lord St. Leonards justly observes, with great learning and ability, and the arguments will repay the student's careful perusal. Sugd. Prop. 344. The majority of the Judges, viz. Tindal, C. J., Williams, Coltman, Maule, Wightman and Cresswell, JJ., and Alderson, Rolfe and Platt, BB., delivered opinions against the validity of the bequests subsequent to the gift of the grandson, while Parke, B., and Patteson, J., were in favour of their validity. The House of Lords affirmed the decision of the Court below, on the ground of the remoteness of the bequests under which the appellant claimed. Lord Lyndhurst, C., in proposing the affirmance of the decree of the Court below, observed,—“The disposition of the leasehold premises, of the corpus, was to be to a person answering two descriptions: he was to be heir male of the body taking by descent from Arthur the grandson, and he was to be of the age of twenty-one years. It is quite obvious that those two circumstances *might* not combine for many generations, and, indeed, it is possible that they might never combine. It is quite obvious that those two circumstances might not combine for many generations; and, indeed, it is possible that they might never combine. It is obvious, therefore, that this disposition of the property is void for remoteness; for, as everybody knows, property of this description must vest, if at all, within a life or lives in being, and twenty-one years afterwards, and, to speak with perfect correctness, a few months for gestation. It is wholly immaterial in this case, that there was a person twenty-one years of age answering the description at the time; that is, to make use of a phrase of a noble and learned lord in the case of *Tollemache v. The Earl of Coventry* (2 C. & F. 611), that it was a pure accident, it might or it might not have happened. *Unless it is absolutely certain that the event must happen* within the period prescribed, it is quite clear that the rule of remoteness applies to this case, and the devise becomes altogether void. . . . But, my Lords, it is supposed that this gift of the corpus of the estate is operated upon in some degree by the disposition of the intermediate rents and profits. The disposition of the intermediate rents and profits is to the

collateral to estates tail, they are altogether unobjectionable, for they "may be barred by the owner of the preceding estate tail; and if once an estate in fee has been acquired by any one claiming under the limitations of the instrument by which the powers were created, they naturally ceased." Per Lord Chancellor Sugden in *Cole v. Semell*, 4 Dru. & Warr. 32; and see *Waring v. Coventry*, 1 My. & K. 248; *Wood v. White*, 2 Keen, 664; 4 My. & Cr. 460; *Wallis v. Freestone*, 10 Sim. 225; *Briggs v. Earl of Oxford*, 1 De Gex, Mac. & Gord. 363. Where, however, general powers of sale and exchange are collateral to an estate in fee, it is presumed, unless they are to be exercised with the consent of the person for the time being entitled to the estate, they will be void. *Lewis, Perpet.* 556; *Boyce v. Hanning*, 2 Cro. & Jer. 334.

The case of *Ferrand v. Wilson*, 4 Hare, 344, seems to depart from what appears to be generally laid down by the authorities, viz. that where powers are collateral to an estate tail, and therefore destructible, they do not come within the dangers of a perpetuity. In that case subject to the trusts of a term of twenty-one years, real estates were devised to A. for life, remainder to B. for life, with remainder to his sons successively *in tail*, with other remainders over for life and *in tail*, and power was given to the executors and the survivor of them, and the executors of the survivor, at *any time or times* not only during the term of twenty-one years, but at any time afterwards, *until some person entitled in possession to an estate tail*, or some greater estate, should attain the age of twenty-one years, to fell and sell the timber, and apply the proceeds in payment of funeral expenses, debts and legacies, the overplus from time to time to be invested, with the consent of the devisee in possession, in the purchase of lands to be settled to the same uses as the devised premises, the money in the mean time to be invested in government or real securities, and the dividends and interest to be paid to the persons who would be entitled to the rents and profits of the premises if the same had been purchased. It was held by Sir James Wigram, V. C., that the power was too remote, and it was declared, that the trusts concerning the timber to be felled by the executors during the term and at any time afterwards, until some person entitled in possession to an estate tail, or some greater estate of and in the said estates, should attain twenty-one years, and of the monies to arise by such timber respectively, were void for remoteness.

In *Briggs v. The Earl of Oxford*, 1 De Gex, Mac. & Gord. 363, by a settlement, family estates were vested in trustees, upon trust for the father for life, with remainder to his eldest son without impeachment of waste, but subject to a power thereafter given to the trustees, with remainder to the first and other sons *in tail male*, with remainder to the heirs and assigns of the father in fee. The power given to the trustees was, that it should be lawful for them at any time or times thereafter, so long as there should be any mortgage upon the estates (but after the death of the father, not without the consent of the son if living, in writing), to fell timber upon the estates, and to apply the proceeds in discharge of any in-

cumbrances, it was held by the Court of Appeal in Chancery, affirming the decision of Sir J. Parker, V. C. (5 De G. & Sm. 156), (before whom, however, this question was not raised), that the power in the trustees to cut timber was not to any extent invalid as tending to a perpetuity. Neither of the learned Judges in their judgments expressly dissented from the decision of Sir James Wigram, in *Ferrand v. Wilson*, and appear to have considered the cases as distinguishable. "Some of the expressions," observed Lord Cranworth, L. J., "in the judgment of Sir James Wigram, in *Ferrand v. Wilson*, certainly have an aspect favourable to the view taken by the defendant; but I think there is a manifest distinction between the cases. If the law be not that a power is always good so far as a perpetuity is concerned, if it is capable of being barred by a common recovery, or by that which is equivalent to a common recovery, perhaps it is a matter of regret that that is not the state of the law. If there are exceptions to the rule, I think they have created *more embarrassment than is compensated for by any benefit which they have produced.*" His Lordship, after observing, that it was not necessary to pronounce any opinion upon *Ware v. Polhill*, or *Ferrand v. Wilson*, added, "I think these authorities, are not applicable to this case. This is a case in which not only is the power capable of being barred by the act of the first tenant in tail, when he is in a condition which, in point of law, enables him to act at all, by his being of the age of twenty-one, but in which the power is one to be exercised solely by virtue of the contract between the parties to the settlement, a contract to this effect, that that which was a debt upon the estate should be liquidated in a particular mode. It appears to me, that to whatever extent of time the operation of that contract extends, it is not a contract within the doctrine of perpetuity. The person who enjoys the estate has only to pay off the incumbrance, and there is an end of it." Lord Justice Knight Bruce observed, "It has been said, that the power is void, as trespassing on a perpetuity. But the circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least, to a power of this description, on that ground."

Effect of a Limitation being too remote on subsequent Limitations.

Where a limitation is void as being too remote, any subsequent limitations are not thereby accelerated but are void also. Thus in the well-known case of *Robinson v. Hardcastle*, 2 Bro. C. C. 22, S. C. 2 T. R. 241, 380, 781, where a father having under his marriage settlement power to appoint among the *children* of the marriage, by his will gave a life interest to his son, and estates tail to his *grandchildren*, with remainder over in moieties to two daughters in fee, the appointment to the grandchildren being clearly bad; the question arose as to the validity of the remainder in fee to his daughters. And upon a case being sent by Lord Thurlow it was certified by the Court of King's Bench, that the devise over to the daughters was void. And Buller, J., observed, that if a subsequent limitation depended on

a prior estate, which was void, the subsequent one must fall with it; to support the opposite argument the testator must be considered as intending, that if the first use was bad, the subsequent limitations should take place, which would be extraordinary indeed. See also *Cambridge v. Rous*, 8 Ves. 12; *Palmer v. Holford*, 4 Russ. 403.

Even if the object of the limitations void for remoteness should never exist, the subsequent limitations nevertheless cannot be supported. *Proctor v. Bishop of Bath and Wells*, 2 H. Black. 358; and see *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25, and the remarks of Lord St. Leonards in *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 182.

But although, as we have before seen, a future limitation must necessarily, if at all, vest within the period allowed by the rule against perpetuities, and will not be rendered valid, if in the event which has happened the rule would not be offended against, nevertheless where a limitation over arises on alternative events, or as it is sometimes said, arises upon a contingency with a double aspect, one of which is within the rule, and the other exceeds its limits, the validity of the limitation over will depend upon the event.

If, for instance, there were a bequest to A. for life, with a limitation to his son, then unborn, on his taking holy orders (which might not necessarily happen within twenty-one years after his father's death), and *in case he should have no such son, or if A. should die without ever having had a son*, then over. The first limitation to a son of A. being too remote in the event of his death without having attained the necessary qualification, the gift over would not take effect, though it would if A. died without ever having had a son. Many other examples might be given. See *Longhead v. Phelps*, 2 Black. 704; *Crompe v. Barrow*, 4 Ves. 681; *Leake v. Robinson*, 2 Mer. 363; *Cambridge v. Rous*, 8 Ves. 12; *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25; *Goring v. Howard*, 16 Sim. 395; *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 145.

A gift over, made in words comprising only one event, will not be construed as made on two events, although, in point of fact, it may consist very reasonably of two branches, unless it be so expressed by the testator. *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 145, 183; and see *Burley v. Evelyn*, 16 Sim. 290; *Doe v. Challis*, 15 Jur. 601; 20 L. J., Q. B., 113.

And "where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause, unless it will dovetail in and accord with previous limitations which are valid." Per Lord St. Leonards, C., in *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 182.

Cases where the Rule does not apply.

Where a limitation is so framed as that the gift under it *vests*, that is to say, becomes transmissible and alienable, by the person taking it, within the period allowed by the rule, it is immaterial that the possession or term

of enjoyment is postponed beyond the legal period ; for in such case the clause postponing enjoyment will, so far as it exceeds such period, be considered void, and the gift consequently be to that extent accelerated. Thus in *Murray v. Addenbroke*, 4 Russ. 407, a testator gave the residue of his property to his wife for life, and at her demise to the eldest surviving son of Sir John Murray *upon his coming to the age of twenty-five years* (the trustees being directed to apply the interest to his use after the death of the tenant for life, until he should attain twenty-five) ; or, failing such issue male, to the daughters of Sir John Murray *living at the time of the demise of the last of such issue male*, in equal proportions. The only son of Sir John Murray died before he attained twenty-five years of age, in the lifetime of the widow, leaving two daughters of Sir John Murray surviving him. It was held by Lord Chancellor Lyndhurst, that if there had been any son of Sir John Murray living at the death of the widow he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five ; and that therefore the gift over to the daughter of Sir John Murray was not too remote, and that in the event which happened, upon the death of the widow, they became entitled to the residue. “ It appears to me,” said his Lordship, “ that the whole interest is given to the son ; the whole of it is to be applied to the use of the son, though the manner in which it is to be so applied, is left to the discretion of the trustees ; and, therefore, as the whole interest is given immediately upon the death of the widow, the eldest surviving son would, upon her death, have taken a vested interest in the residue. Therefore the gift to the son is not too remote. . . . The limitation of the residue to the daughters is not too remote, and the intention of the testator, as expressed in the terms he has used, is obviously this,—that the eldest son surviving the widow shall take, and if there be no son surviving the widow, that the daughters who are living at the death of the last son, who died in the lifetime of the widow, shall take the property in equal shares.” See also *Farmer v. Francis*, 9 Moo. 310 ; 2 Bing. 151 ; *Dodson v. Hay*, 3 Bro. C. C. 404 ; *Montgomerie v. Woodley*, 5 Ves. 522 ; *Bingley v. Broadhead*, 8 Ves. 415 ; *Kevern v. Williams*, 5 Sim. 171 ; *Blund v. Williams*, 3 My. & K. 411 ; *Blease v. Burgh*, 2 Beav. 221 ; *Doe d. Dolley v. Ward*, 9 Ad. & Ell. 582 ; *Saunders v. Vautier*, 4 Beav. 115 ; 1 Cr. & Ph. 240 ; *Greet v. Greet*, 5 Beav. 123 ; *Harrison v. Grimwood*, 12 Beav. 192 ; *Jackson v. Majoribanks*, 12 Sim. 93 ; *Milroy v. Milroy*, 14 Sim. 48 ; *Marquis of Bute v. Harman*, 9 Beav. 320.

It is often a difficult question to determine whether the postponement is applicable to the vesting or only to the possession or enjoyment ; and the Courts have adopted a mode of construction wholly independent of what the result may be ; so that if the postponement, being beyond the limits of the rule, according to the strict rules of reading the instrument in which the gift is contained, applies to the vesting, the gift will be void. See *Leake v. Robinson*, 2 Mer. 363 ; *Bull v. Pritchard*, 1 Russ. 213 ; *Palmer v. Hol-*

ford, 4 Russ. 403; *Vandry v. Geddes*, 1 Russ. & My. 203; *Judd v. Judd*, 3 Sim. 525; *Hunter v. Judd*, 4 Sim. 455; *Porter v. Fox*, 6 Sim. 485; *Dodd v. Wake*, 8 Sim. 615; *Newman v. Newman*, 10 Sim. 51; *Ring v. Hardwick*, 2 Beav. 352; *Griffith v. Blunt*, 4 Beav. 248; *Leach v. Leach*, 2 Y. & Coll. C. C. 495, 499; *Bull v. Pritchard*, 5 Hare, 567; *Boughton v. James*, 1 Coll. 26; 1 H. L. Cas. 406; *Comport v. Austen*, 12 Sim. 218; *Speakman v. Speakman*, 8 Hare, 180; *Boydell v. Golightly*, 14 Sim. 327.

If it appears that the members composing the class to which the gift is made are to be ascertained immediately upon the death of the testator, the question as to whether postponement applies to vesting or enjoyment is immaterial. *Elliott v. Elliott*, 12 Sim. 276; *Leach v. Leach*, 2 Y. & Coll. C. C. 495.

Where an absolute gift is made, it will not be qualified or cut down by any subsequent gift or clause obnoxious to the rule against perpetuities, but will be construed as though such latter gift or clause, whether contained in the same or a subsequent instrument, had no existence. Thus in *Carver v. Bonles*, 2 Russ. & My. 304, a testator, having power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters, equally to be divided among them share and share alike, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and *their issue* as were thereafter expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue. These trusts were to pay the interest to each daughter during her life to her separate use, and without power of anticipation or alienation; after her decease, for her children as she should appoint, in default of appointment for her children equally, in default of children as she should appoint, and in default of such appointment for her next of kin. The Master of the Rolls held, "that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interests by limitations to their issue, *being inoperative, did not cut down the absolute appointment*; but that it was competent to the donee of the power to limit the interests which he appointed to his daughters to their separate use, and to restrain them from anticipation and alienation."

Upon the same principle, in the case of *Arnold v. Congreve*, 1 Russ. & My. 209, a testatrix, having by her will given to her grandchildren (the gift not being confined to those living at her death) absolute interests, by her codicil expressed her desire that they should only take life interests, in order that their children might take in succession after their deaths. It was held by Sir John Leach, M.R., that the object of the testatrix, in making the codicil being for the purpose of letting in the children of the grandchildren, necessarily failed; and that as the great-grandchildren could not take, the intention of the testatrix would be best effectuated by holding that the *absolute interests given to the grandchildren by the will were not destroyed by the codicil*. See also *Kampf v. Jones*, 2 Keen, 756; *Ring v. Hardwick*, 2 Beav. 352; *Church v. Kemble*, 5 Sim. 525; *Wells v. Malins*, 3 Jur. 36;

Saumarez v. Saumarez, 4 My. & Cr. 331; *Blacket v. Lamb*, 14 Beav. 482; *Fry v. Capper*, 1 Kay, 163; *Harvey v. Stracey*, 1 Drew. 73; *Hobbs v. Parsons*, 2 Sm. & Giff. 212.

It may here be mentioned, that the Court will not in general raise estates by implication, which in other cases it will sometimes do in favour of the intention, if the effect would be, that such estates would be void for remoteness. *Chupman v. Brown*, 3 Burr. 1626; *Monypenny v. Dering*, 16 Mees. & W. 437.

Upon the same principle, where there is an executory trust which, if carried literally into effect, would be void as infringing upon the rule against perpetuities, the Court of Chancery, in order to carry out the intention of the creator of the trust as far as possible, will direct a settlement to be made complying with the rule, but which will be as strict as the law will permit. *Humberston v. Humberston*, 1 P. Wms. 332; *S. C.* 2 Vern. 737; *Prec. Ch.* 455, stated ante, p. 360; and see *Banhes v. Baroness Le Despencer*, 10 Sim. 576; *Lincoln v. Duke of Newcastle*, 3 Ves. 387; 12 Ves. 218; *Woolmore v. Burrows*, 1 Sim. 512; *Lord Dorchester v. Earl of Effingham*, 10 Sim. 587, 588, n.; 3 Beav. 180, n.; *Williams v. Teale*, 6 Hare, 239; and cases there cited; *Tennent v. Tennent*, Dru. 161; *Boswell v. Dillon*, Ib. 291; *Trevor v. Trevor*, 13 Sim. 108; 1 H. L. Cas. 239; *Boydell v. Go-lightly*, 14 Sim. 346; *White v. Briggs*, 15 Sim. 17; and see note to *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 1.

The Courts have also, according to the doctrine of *cy près*, by sacrificing the particular intention of a testator, which cannot be carried out in consequence of its being contrary to the rule against perpetuities, given effect to his general intention in a mode which is within the rule. As where a life interest in property is devised to an unborn person for life, with remainder to his first and other sons in tail, the remainder in such case being clearly invalid as being beyond the limits allowed by the rule, the Courts, seeing that it is the testator's general intention to benefit the issue, though it cannot be done in the particular mode pointed out, carry out the general intention by giving an estate tail to the unborn person, to which, if not barred, the issue may ultimately become entitled (*Nicholl v. Nicholl*, 2 W. Black. 1159; *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781; *Hopkins v. Hopkins*, Co. Litt. 272 a, Butler's note, 1, vii. 2; 1 Atk. 581); and an estate tail has been given to the first taker, even where the limitation was to his children as tenants in common in tail, although it will be observed, that an estate tail which would descend to the children successively, does not very accurately carry out the intention of the testator, that they should take concurrently. See *Pitt v. Jackson*, 2 Bro. C. C. 51; 2 Ves. jun. 349; *Smith v. Lord Camelford*, 2 Ves. jun. 698; and see ante p. 311; see also *Vanderplank v. King*, 3 Hare, 1; *Stackpoole v. Stackpoole*, 4 Dru. & Warr. 320.

But although, as in the last cited cases, by the doctrine of *cy près* a different provision may be made, for persons for whom the testator intended to pro-

vide, an estate cannot be carried to a class or a portion of a class for whom the testator never intended to provide. *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 145, 175, overruling the decision of Sir James Wigram, V. C., reported 7 Hare, 568.

As we have before seen, the doctrine of *cy près* is not applicable to personal estate (*Routledge v. Dorril*, 2 Ves. jun. 365; see vide *Mackworth v. Hinxman*, 2 Keen, 658); nor, it seems, to a mixed fund (*Boughton v. James*, 1 Coll. 44; 1 H. L. Cas. 406); nor where successive life interests merely are given (*Somerville v. Lethbridge*, 6 T. R. 213; *Seaward v. Willock*, 5 East, 198; *Beard v. Wescott*, 5 Taunt. 393; 5 B. & Ald. 801; T. R. 25); nor where the children of the unborn person to whom a life interest is given take an estate in fee simple, *Bristow v. Warde*, 2 Ves. jun. 336. Lastly, the doctrine of *cy près* is not applicable in the construction of deeds. *Brudenell v. Elwes*, 7 Ves. 382.

Exception from the Law of Perpetuities.

One exception from the rule against perpetuities is where land is purchased, or property held, by a corporation. But as corporations cannot in general purchase real estate without licence from the crown, which will be withheld except in proper cases, no perpetuity will be created, unless for the public good, or to an extent which would not create any appreciable abstraction of land from commerce. See Shelf. Mortm. 39; Burt. Comp. 68.

Moreover, gifts to charities do not fall within the rule against perpetuities, a gift in perpetuity to a charity being valid, though with respect to land, the requisitions of 9 Geo. 2, c. 36, must be complied with. Hence a contingent limitation over of property from one charity to another, in an event which in the case of individuals would render the limitation void, as being in contravention of the rule against perpetuities, is good, and will be supported in equity. Thus in *Christ's Hospital v. Grainger*, 1 Mac. & G. 460, the corporation of Reading held property under a will made in 1624 on certain trusts for the benefit of the poor of the town of Reading, with a proviso that if the corporation should for one whole year neglect to observe the directions of the will the gift should be utterly void, and the property be transferred to the corporation of London, in trust for the benefit of Christ's Hospital. The corporation of Reading having acted in disregard of the directions of the will, upon a suit instituted by the corporation of London claiming the property on behalf of Christ's Hospital, it was held, that a contingent limitation over of property from one charity to another, was not within the principle of the rules against perpetuities. "Those rules," said Lord Chancellor Cottenham, "are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's

Hospital in London? The property is neither more nor less alienable on that account."

Another exception to the rule of perpetuities is where property is by act of parliament strictly entailed upon certain families in reward for public services, as in the case of the first Duke of Marlborough (3 & 4 Anne, c. 6; 5 Anne, c. 3; 5 Anne, c. 4) and the first Duke of Wellington (54 Geo. 3, c. 161).

Another exception to the rule against perpetuities is where a grant has been made to a person in tail of the purchase or provision of the crown, in reward of services, inasmuch as 34 & 35 Hen. 8, c. 20, prohibits in such case the tenant in tail, as long as a reversion or remainder subsists in the crown, from barring his own issue (Dy. 32; Pig. Recov. 84; 3 & 4 Will. 4, c. 74, s. 18); but if the remainder or reversion become vested in a private person, the tenant in tail might formerly by a common recovery (Pig. Recov. 88; 1 Prest. Convey. 18, 145), and may now, by a disentailing assurance (3 & 4 Will. 4, c. 74), acquire the fee simple.

And by the prerogative of the crown, independent of 34 & 35 Hen. 8, other estates tail, not being granted as a reward or in consideration of services, subject to which the crown is entitled to the reversion, can only be barred so far as regards the issue and all subsequent limitations to subjects, and not so as to prejudice the rights of the crown. Pig. Recov. 86, 87; 1 Prest. Convey. 19, 146.

By 3 & 4 Will. 4, c. 74, s. 18, it is provided "that the power of disposition thereinbefore contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth year of the reign of his majesty King Henry the Eighth, intituled 'An Act to embar feigned Recovery of Lands wherein the King is in Reversion,' or by any other act, are restrained from barring their estates tail."

It seems, therefore, that estates tail, expectant upon which the reversion is in the crown, and which were formerly protected by its prerogative, independent of statute, are not exempted from the operation of the act of 3 & 4 Will. 4, c. 74, and may therefore be now barred.

It may be here mentioned, that the Courts will not allow a perpetuity to be created by a fraud upon the provisions of 34 & 35 Hen. 8, c. 20. Thus where lands were conveyed to the crown, with an intent that the crown should reconvey to the same person in tail, reserving the ultimate reversion to the crown, it was held that such an estate tail would not be within the protection of the statute. *Johnson d. Earl of Anglesea v. Earl of Derby*, Pig. Recov. 201; 2 Show. 104.

GRIFFITHS v. VERE.

Nov. 4, 9, 1803.

[REPORTED 9 VES. 127.]

TRUSTS FOR ACCUMULATION.]—*Trusts by will for accumulation during a life, contrary to the statute 39 & 40 Geo. 3, c. 98, is good for twenty-one years by that statute.*

CHARLOTTE MATTHEWS by her will, dated the 6th of November, 1800, devised all her real estates to trustees, their heirs and assigns, upon trust to sell; and after certain legacies she gave all the rest of her monies, goods, chattels, credits, personal estate and effects whatsoever to the said trustees; directing them, as soon as conveniently may be after her decease, to get in her debts, and convert into specie such of her personal estate as should not be in specie, except articles specifically bequeathed; and further directed the trustees, &c., as soon as possible after paying her debts, funeral expenses and legacies, to invest the residue of the monies arising from the sale of her said real estates and from her personal estate in the public funds or real securities; upon trust, out of the dividends or interest, to pay to *Ann Townsend* an annuity of 10*l.* for her life; and to pay the residue of the said dividends, &c., to her sisters, *Elizabeth Mary Griffiths* and *Martha Vere*, during their joint lives, in equal proportions; and after the decease of either of them, the whole of the said dividends or interest to the survivor during her life; *provided*, and she declared her will, that so much of the said dividends or interest as shall accrue due to *Elizabeth Mary Griffiths* during the life of *John Griffiths*, her husband, shall not, during that time, be paid to her or to any person for her use; but the same shall be during his life invested by the trustees in the public funds or government or real securities; and that the dividends or interest which shall accrue thereon shall be added to and accumulated with the capital; and, upon the decease of the said *John Griffiths*, the said capital, with the accumulations thereof, shall

be forthwith transferred or paid to Elizabeth Mary Griffiths; and if she shall be then dead, the testator bequeathed the same to *Martha Vere*, if then living; and if not, then the same was to sink into the residue of her personal estate; and upon further trust, from and immediately after the decease of the survivor of *Elizabeth Mary Griffiths* and *Martha Vere*, to transfer the first-mentioned trust funds and the last-mentioned trust funds, with the accumulations thereof, in case the same shall have sunk into the residue of her personal estate, as aforesaid, to other persons.

Under the bill by Mrs. Griffiths and her husband, the accounts having been directed against the trustees, who were also executors, a petition was presented by the plaintiffs, praying a declaration that the proviso directing accumulation is contrary to the late act of parliament (a), and therefore null and void; and that the petitioners are entitled to have full benefit of the will, as fully as if such clause had not been inserted; and a transfer to the Accountant-General, &c.

A petition for the same purpose had been presented to the Master of the Rolls, and dismissed.

Mr. *Richards* and Mr. *Owen*, in support of the petition.—The meaning of this act is, that the whole attempt against which it is directed shall be void. It cannot therefore be good for a given time, the legislature having intimated nothing to that effect. A direction to accumulate for a life is a direction to accumulate for more than twenty-one years; a life estate being larger than an estate for years. The value of the life is of no importance; and the Court will not inquire into that. This act is to be construed by analogy to the law of executory devises, which are allowed only within certain limits. As the accumulation may, by possibility, last longer than twenty-one years, the disposition is void; as a limitation over of personal property after a disposition to a man and the heirs of his body is void; without regard to the possible event that they may be extinct within the period allowed by law. If the accumulation should, under the direction in the will, continue beyond the twenty-one years, what is to become of that which is accumulated after that period, and of the interest of the previous accumulation? This act has analogy to the act of *Hen. 8* (b). It is not material that the one is a restraining, the other an enabling,

(a) Stat. 39 & 40 Geo. 3, c. 98.

(b) Stat. 32 Hen. 8, c. 28.

act; but the same construction must be put upon the same words, unless tending to defeat the general intention of the act.

Mr. *Romilly*, Mr. *Roupell* and Mr. *Trower*, for the other parties against the petition.—This case arises upon a restraining statute; restraining the legal right to dispose of property. It has no analogy to the statute of *Hen. 8*, which is an enabling statute. Neither has it analogy to executory devise. Upon the construction of this act it clearly was not intended to prevent accumulation, in any case, after the death of the party, to the period of twenty-one years; and though an attempt is made to go beyond that, the purpose shall be good to that extent in whatever form it is directed; for no precise form of directing accumulation is prescribed, nor could that be intended; but it is sufficient, whatever the form, that it is not to exceed the period of twenty-one years. The direction, that so far as accumulation is directed contrary to the act, it shall be void, applies only to the excess. There will be certainly some difficulty, in the event of the parties living beyond the period of twenty-one years, to determine what shall become of the excess. But in this case, if Mrs. *Griffiths* survives that period, she will be entitled to the accumulation, provided she survives her husband, to whose death it is confined, and it is possible, that he may live only two or three years.

LORD CHANCELLOR (*Lord Eldon*).—I will talk to the Master of the Rolls and some of the Judges upon this case. The question is, whether, where the intention appears to attempt to make an accumulation for more than the life by deed, or twenty-one years by will, the whole shall be void; or whether it shall take effect for the period during which the legislature meant it to be still lawful to direct accumulation. Previously to this act it was competent to a man to dispose of property by will, and I think the authorities go also to accumulation of rents and profits, for a life or lives in being and twenty-one years, and a little more, meaning the time of gestation; and without considering whether that may be put at the beginning as well as the end of the period, the point is whether the legislature meant to apply the principle, long settled as to executory devise, that if limitations are directed which go beyond the period allowed, it is void for the whole, and it is not good for the time allowed by law; the party not having said that. As to estates for life and for years, when the law speaks of the one as larger than the other,

it does not look to the quality of duration. Upon the direction of the act, that the rents and profits, so long as the same shall be directed to be accumulated contrary to the provisions of this act, shall go to such persons as would have been entitled, if such accumulation had not been directed, the question is, whether if any part goes beyond the period in which it might be consistent with the act, it is void during the whole period of the accumulation directed, or for such time only during which it could not be lawfully directed according to the act. Upon that it is necessary to consider the point alluded to: that cases may arise as to what is to become, during the residue of the joint lives after the twenty-one years, of the fruit of the fund accumulated during the twenty-one years.

LORD CHANCELLOR (*Lord Eldon*).—This question turns upon the will and the act of parliament. I understand a petition to the same effect was presented to the Master of the Rolls, insisting, that by this will accumulation is prescribed beyond what is allowed by the act; and therefore the direction is wholly void; and that then the plaintiffs were, in right of Mrs. *Griffiths*, within the terms of the act the persons entitled to the rents and profits, as if no such clause for accumulation was in the will; and the Master of the Rolls was of opinion, that, upon the true construction of the act, the accumulation directed during the life of the husband, if not in fact going beyond twenty-one years, was good; and if it did in fact continue beyond that period, yet upon the true construction of the act the direction was good *pro tanto*; and during the period of twenty-one years the rents and profits are well directed to accumulate; leaving it to the law to determine what is to become of the rents and profits to accrue between the end of the twenty-one years and the expiration of the life; and of course to determine also, what is to become of the interest of the fund created by the accumulation permitted for the period of twenty-one years. This brings before me the consideration, whether that judgment is right.

We all know the origin of this act (c). Previously, I conceive, the law upon this point to have stood in this way; that you might by executory devise, prevent an estate from vesting during a life or lives in being, and twenty-one years, and a small portion of time—the period of gestation. In *Long v. Blackhall* (d), the question first arose, whether

(c) See *Thellusson v. Woodford*, 4 Ves. 227.

(d) 3 Ves. 486, 487; 7 T. R. 100.

that period could be allowed both at the beginning and the end ; that is, whether a child *en ventre* could be considered a life in being, the *terminus à quo* the time was to run. Whether the law is according to that decision or not, it was quite a settled notion previously, that you might, by executory devise, prevent an estate vesting for a life or lives in being, and twenty-one years, with that small addition at the end of the life ; subject to all question as to the inconvenience from the circumstance of selecting a great number of lives, which might be considered *sub judice*. But it was generally so understood, and it was always conceived that, for the period during which you could prevent the estate vesting, you might direct the rents and profits to accumulate. Such being supposed to be the capacity which every testator and grantor had, this act passed ; and I believe it was considerably altered from what it was when introduced in the House of Lords, having received alterations in both Houses which were not foreseen. But, I believe, the object of those who introduced it, and the idea of all was, that in general, if not in all cases, those rents and profits would have gone, not to persons claiming by disposition, but by the effect of the act striking out of the will the direction for accumulation, to those entitled by intestacy ; for, if literally pursued, the testator might give his estate to a person, not to take till the expiration of twenty-one years after a life in being ; and if he said nothing about accumulation, the rents and profits would be undisposed of ; if he directed what the act authorizes him to direct, that for the first twenty-one years after his death there should be accumulation, at the end of that time there might be a very long period, during which the rents and profits would go to no one by the disposition, but in the case of real estate, would belong to the heir ; and in the case of personal estate, unless there was an express disposition of what was not before disposed of, to the next of kin.

The sort of case now before me was not, I believe, much in the contemplation of the legislature. It is material to attend to every word of the act ; for the language is not very similar to any other act, with either enabling or restraining clauses. The phrase "partial accumulation" is rather expressive of the effect than of direction, but, considering the subsequent part, it must be construed what shall be directed to be accumulated. If the act stopped at the declaration, that it shall be null and void, the estate in the mean time would be considered as not given unless falling into the residuary devise ; and

therefore the rents and profits undisposed of must have gone to the heir. But the question is, whether the following words are not so explanatory of the former as to show in what sense the legislature used the words declaring that it should be null and void, and whether, taking the whole clause together, it was not meant only as far as by the subsequent words it is directed to be so considered. The words "so long," admit two constructions: one, so long as the same, by the effect of the direction in the will, shall be capable of being accumulated beyond twenty-one years from the death; the other, so long as the same shall be directed to be accumulated contrary to the provisions of the act: the accumulation being understood to be contrary to the act, if directed by the will for more than twenty-one years.

It was argued that the direction to accumulate for a life is a direction to accumulate for more than twenty-one years; as an estate for life is a larger estate. It was further argued, upon analogy to executory devise, viz. that if the disposition is such as may postpone the vesting for more than lives in being and twenty-one years, &c., that executory devise is not capable of being supported in law, because the estate may vest before that period runs out; and that is very well settled. It was very much discussed in the case upon Lord *Foley's* Will. It is insisted that by analogy this act is to be so construed. There is no doubt a life estate is a larger estate not with regard to duration as to time but as to the interest taken in it. As to the analogy between executory devise and the law to be considered laid down by this act, if the act itself does not prescribe what is to be the effect of the direction, the analogy may be resorted to in order to determine the effect: but, if the act has itself said what is to be the effect, you cannot, upon analogy, go farther than to apply it, as far as the directing words of the act will allow. The statutes enabling and restraining as to leases have been alluded to; and the whole doctrine, beginning with the statute of *Hen. 8*, is to be found in *Bacon's Abridgment* (e); which is understood to have been written by a very eminent person. The true principle, as there collected, seems to amount to this; that the intention, with reference to which the act and the expressions contained in it are used, must be considered; and in those cases in which particular terms, leases for lives or twenty-one years, are pointed out, it is in vain to say it is to be considered good under a statute which has said, if otherwise made, it shall be void to all intents. As to the act 32 *Hen. 8*, it has

(e) *Bac. Abr.* tit. "Lease."

been considered, particularly in *Smith v. Trinder* (f), that, those words not being contained in that act, a construction may be put upon it to make the lease good. That, therefore, goes no farther than that in the construction of this act you may consider upon the words what was the intention of the legislature, and how far that allows you to make good what is directed, regard being had to the terms in which the prohibition and the consequences of violating that prohibition are prescribed.

It is obvious that many cases upon the old law of executory devise and accumulation are not in any manner provided for by this act. I doubt whether the present case was thought of; for by this will the estate is given, not by executory devise but by creating a trust to pay the annual profits: and then follows the direction for accumulation. If that direction was struck out, it is contended that the effect is not, as in other cases, that those profits would be undisposed of; but that it must be considered a gift *in præsentis*; and that the clause for accumulation does not prejudice their immediately entering into the enjoyment. If it was necessary to decide that question a good deal is to be said upon it; and it is not clear upon this will, that it could necessarily be made out that there was a gift *in præsentis*, if this direction was struck out of the will; for the whole must be taken together. But, supposing it not struck out, is the direction void altogether, because it is not a direction for accumulation during twenty-one years or less, but which may happen to operate during a period that may last longer; admitting also that it may operate as a direction for less in effect? The point is doubtful; but, upon the whole, that construction, which has been put upon this act, is the right one; and I am the rather led to that by the concurrence of opinion among those, to whose assistance I have resorted upon the first construction of an act of so much importance, who all agree that this is the proper construction.

The difficulty was put strongly, that supposing the life of the husband should happen to endure for more than twenty-one years, what is to become of the profits accumulated at the end of the twenty-one years? and it is well put in these terms upon this will. It is clear now, accumulation may be directed for twenty-one years, where an executory devise is created as large as heretofore; and when therefore there may be a very long interval. The very same difficulty might occur upon a will precisely in the terms of the act, as upon this will. For instance,

(f) Cro. Car. 22.

suppose the testator had an infant son, a year old, and a brother, and that he expressly directed accumulation for twenty-one years; and, subject to that, gave the estate to his eldest son; and after the decease of his eldest son, to the eldest son of his brother: suppose the will contained a direction, that the property so accumulated, under a direction admitted to be legal, should go to the person who, under those limitations, was to take the estate: it is clear, though the direction to accumulate is only for twenty-one years, yet, under the combined effect of the direction and the law, there might be an accumulation for forty years; for if the son lived till just about the end of the first twenty years, and then died, and the brother had a son a week old, and by his will he had provided a maintenance for his own son, under the direction of the law that accumulation, 4,000*l.* for instance, must, during the minority of that son, accumulate in this Court. It is clear then he would take the accumulation of forty years, though the legislature did not mean that; and there would be no difficulty, consistently with the principle which is to result from this decision, in deciding that, whenever it arises. I could put many cases, in which the same difficulty would occur, if the direction for accumulation was in the very terms of this will.

Under these circumstances, finding the Master of the Rolls's opinion to be such as I have stated, and that it has the concurrence of those whom I have consulted, it would be enough for me, if it was only the inclination of my own opinion, to say, this is the right construction.

Petition dismissed.

Griffiths v. Vere is usually cited as a leading case on the construction to be put upon 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act; and the dicta as well as the decision of Lord Eldon in that case have been adopted by subsequent Judges.

Previous to the passing of that act, as is laid down by Lord Eldon in the principal case, the accumulation of the income of property, and the suspension of all enjoyment of it, might have been directed for the same period as the suspension of its alienation or vesting, viz. for a life or lives in being and twenty-one years after, the rule against perpetuities being the only rule against accumulation. See *Cadell v. Palmer*, ante, p. 321. The inconvenience, however, of the rule with reference to accumulations does not appear to have presented itself to the test of public opinion, until Mr. *Thellusson*, by his much litigated and extraordinary will, vested the bulk of his

large property in trustees, with directions to accumulate the income during the lives of his sons and of any of their descendants living at the time of his decease or born in due time afterwards. See *Thellusson v. Woodford*, 4 Ves. 112, where after long and elaborate arguments on both sides, amongst which that of Mr. Hargrave is well worthy of perusal, Lord Rosslyn, assisted by Lord Alvanley, M. R., Buller, J., and Lawrence, J., held the direction to accumulate valid, and upon appeal to the House of Lords the decision was affirmed. (See 11 Ves. 112.) It is clear, indeed, that an additional period of twenty-one years from the death of the survivor of Mr. Thellusson's descendants might have been legally added without violating the law as it then stood, as accumulation would then only have been directed for a life or lives in being and twenty-one years after.

"The effect of the decision as to Thellusson's will," observed Lord Loughborough in the House of Lords when the Thellusson Act (as a bill) was read the first time, "was inconceivable. He was not long since informed by two eminent conveyancers, that they were instructed by a certain person, whose name, however, for obvious reasons, was kept secret, to frame such an executory devise of his property, as that the next heirs should not come to the enjoyment of it 'during the lives of any of the present peerage of Great Britain.' However, of the kind, it might not be a devise which involved the worst consequences; as the personages to whom it referred were of public notoriety, their demises might be more easily ascertained. But in the case of the lives of an equal number of private persons being involved, what must be the consequence? He thought that some mode should be suggested in order to counteract the effects of what had in another place been happily denominated 'posthumous avarice.'" Hans. Parl. Deb. vol. 34, 1551, A.D. 1798—1800.

The Thellusson Act (39 & 40 Geo. 3, c. 98), after reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereafter contained, enacted, "that no person shall, after the passing of this act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or the term of twenty-one years from the death of any such grantor, settlor, deviser or testator, or during the minority or respective minorities of any person or persons who shall be living or en ventre sa mère at the time of the death of such grantor, deviser or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every

case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Sect. 1.

Sect. 2 provides, "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or devisor, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or devisor, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but that all such provisions and directions shall and may be made and given as if this act had not passed."

The act is not to extend to heritable property in Scotland (s. 3), nor to wills made before the act, unless the testator should be living and of sound mind for twelve calendar months from its passing. Sect. 4.

"This act," it has been truly observed, "has hardly ever been discussed in Courts of Law or Equity without the Judge having occasion to observe upon the inartificial, and in several respects, ill defined language in which its provisions are expressed." 1 My. & Cr. 141.

Applicability of the Act.

The provisions of the first section of the act are applicable, not only where accumulation in express terms, or substantially though in other words, is directed (*Shaw v. Rhodes*, 1 My. & Cr. 135; *Shaw v. Hellier*, 5 C. & F. 114), but also where a direction to accumulate is implied or takes place by operation of law, as where a contingent executory bequest is made which is liable to be devested by the birth of issue, and accumulation, were it not forbidden by the act, must necessarily take place, until the contingency should be determined. Thus in *Macdonald v. Bryce*, 2 Keen, 276, where the testator gave the residue of his property to the eldest son of A., and failing him to the next and other sons of A., and failing the male children of A. to certain legatees named in the residuary clause; and he directed his executors to apply the dividends of his residuary property to the maintenance of the eldest son of A. during his minority, and of the other sons in succession of A. in case of his eldest son dying before attaining the age of twenty-one. A.'s eldest son survived the testator, and died an infant, and A. had no other son, and he and his wife were of a very advanced age. The period allowed by the statute for accumulation having expired, it was held by Lord Langdale, M. R., that although accumulation was not expressly directed, the case came within the act, and that the income of the residue after the time thereby allowed for accumulation had expired, until the contingency upon which the residue was given, either to a son of A. or the legatees, should be determined, belonged to the next of kin.

The late Vice-Chancellor of England, Sir L. Shadwell, V. C., however, took a different view of the construction of the act, and thought that it was applicable only to those cases where there was an express direction to accumulate. In the case of *Elborne v. Goode*, 14 Sim. 174, which, however, was not a decision upon the point, the learned Vice-Chancellor, as a great deal of argument had taken place on the subject, expressed his opinion in clear terms. He first began by citing the observations of, and cases put by, Lord Eldon in the principal case, which wind up by saying, that it is clear under certain circumstances a person "would take the accumulation of forty years." His Honor then adds, "Now Lord Eldon is putting a case of a devise to one party with a direction to accumulate, and then a simple devise to another; and Lord Eldon there supposes, that being the case, that the statute did not at all intend to interfere with the accumulation, which would only be directed by operation of law. And it struck me, in reading the different cases that have followed on the subject, that, notwithstanding Lord Langdale's decision in the case of *Macdonald v. Bryce*, he has himself given a very plain rule in the language which is ascribed to him in the case of *Eyre v. Marsden*, 2 Keen, 574, where his Lordship says, 'The statute, as it appears to me, was not intended to operate, and does not operate, to alter any disposition made by the testator, except his direction to accumulate. Striking that out, everything else is left as before; and all other directions of the will, as to the time of payment, substitution, or any contingencies, are to take effect according to the true construction of the will, unaltered by the effect of the statute.'

"If you apply that language to a case in which no direction for accumulation is given, but there is an executory devise; by the operation of law the rents and profits intermediately accruing would be preserved, by way of accumulation, for the person ultimately taking under the executory devise. Where there is nothing to strike out in the way of direction, you cannot strike out the direction unless you strike out the devise; and the direction, therefore, must be considered as a separate thing from the devise. And my opinion is, that if ever a case should again arise, such as actually did arise in *Macdonald v. Bryce*, it would deserve very serious consideration whether, considering the language of Lord Langdale himself in the case of *Eyre v. Marsden*, and the hypothetical case put by Lord Eldon in *Griffiths v. Vere*, the decision in *Macdonald v. Bryce* could be sustained."

With reference to the remarks made by the Vice-Chancellor upon the case put by Lord Eldon in the principal case, and the decision of Lord Langdale in *Macdonald v. Bryce*, his Honor does not appear to have adverted upon a very material distinction between them; in the former case, after the expiration of the time allowed by the act, accumulation might *accidentally*, and merely as incident to management, in the latter it would *necessarily*, take place. For instance, in the case put by Lord Eldon, if the son of the testator's brother needed the whole income of the fund for maintenance, either in consequence of the sum provided for that purpose, in the

case put, not being sufficient, or of the loss of the funds from which it proceeded, the whole or a part of the income would be allowed for that purpose; clearly showing therefore that the accumulation takes place, not in consequence of any direction either express or implied of the testator, but merely from good management, the Court allowing so much only to be spent as should be absolutely required during the infancy of the owner.

In the case decided by Lord Langdale accumulation must of necessity, even after the expiration of twenty-one years from the testator's death (unless prohibited by the act), have taken place.

With respect to the observation of Lord Langdale in *Eyre v. Marsden*, cited by the Vice-Chancellor, it is clear (as was in fact done by Lord Langdale himself in *Macdonald v. Bryce*) that an excess over the legal period for accumulation may be struck out, whether it takes place either from express direction or by implication. And it is a mere fallacy, conveyed in not very intelligible language, to assume, that "where there is nothing to strike out in the way of direction, you cannot strike out the direction unless you strike out the devise."

In the subsequent case of *The Corporation of Bridgenorth v. Collins* 15 Sim. 538, the testator had directed the income of a trust fund to be paid to certain persons for their lives, and on the death of the survivor of them the fund was to be sold, and the proceeds thereof, and also *the proceeds which should have accumulated in respect thereof*, were to be divided among his second cousins living at the death of the survivor; and in case there should be any difficulty in such persons making out their claims, the trust monies and the interest accruing thereon, and also *the interests and dividends which should have accumulated in respect thereof*, should, at the expiration of two years from the death of the survivor of the annuitants, be divided among the persons who had then made good their claim. The surviving annuitant died more than twenty-one years after the testator's death, and accumulations had arisen between that time and the period of distribution. It was held by Sir L. Shadwell, V. C., that though there were accumulations of the income of the fund, which had arisen after the expiration of twenty-one years from the testator's death, the case was not within the act. "It may be true," said his Honor, "that there has been an accumulation; but it is the result, not of any direction given by the testator, but of chance; and I think that the statute does not apply to an accidental accumulation." Sir John Romilly, M. R., seems to have adopted the same views in *Bryan v. Collins*, 16 Beav. 14; and *Tench v. Cheese*, 19 Beav. 3. The latter case has, however, been overruled (W. R., 1855, p. 501); and the doctrine of Lord Langdale is supported by the greatest weight of authority. See *Evans v. Helier*, 5 C. & F. 114; *S. C. nom. Shaw v. Rhodes*, 1 My. & Cr. 135; *Morgan v. Morgan*, 4 De G. & Sm. 164.

A disposition will come within the act where accumulation is directed beyond the time allowed, although the objects of the gift may have a vested interest capable of alienation. (*Shaw v. Rhodes*, 1 My. & Cr. 135.) And

where accumulations at simple as well as at compound interest are directed. *Ib.*; and see *S. C. 5 C. & F. 114*, nom. *Evans v. Hellier*.

As the Thellusson Act passed shortly before the union, it is not applicable to real estate in Ireland or the rents arising therefrom. *Ellis v. Maxwell*, 12 Beav. 104, 111. The income however arising from the rents will be considered as a portion of the capital or personal estate received from year to year, which cannot be allowed to accumulate under the statute. *Ib.* 111.

Before proceeding to the consideration of the question for what periods accumulation may now be lawfully directed, we may remark that the act (being a restraining act) was merely intended to reduce within certain bounds the power of accumulation as it existed at common law, which was coextensive with the period for which the vesting of property might be prevented by executory devise, but not to give validity to any provision previously void. Hence it has been decided, that, inasmuch as a direction to accumulate for a period which might possibly exceed a life or lives in being and twenty-one years after would have been void before the act, it will not after the act be held only void pro tanto. Thus before the act a testamentary trust or direction to accumulate, so worded as to last, or to be capable of lasting, beyond the compass of all lives in being at the testator's death, and twenty-one years after the death of the survivors of those lives, would have been illegal and void for the whole, and such trust or direction is not less illegal or less void since the act. *Boughton v. James*, 1 Coll. 26, 45; see *Browne v. Stoughton*, 14 Sim. 369; *Lord Southampton v. The Marquis of Hertford*, 2 V. & B. 54; *Marshall v. Holloway*, 2 Swanst. 432; *Curtis v. Lukin*, 5 Beav. 147; *Scarisbrick v. Skelmersdale*, 17 Sim. 187.

In favour of a charity, however, the Court of Chancery will, by means of the doctrine of *cy près*, effectuate the general intention, although the direction to accumulate may be held void. Thus in the case of *Martin v. Margham*, 14 Sim. 230, the testator had directed funds to be provided for certain charity schools by accumulating his property, but fixed no time for the continuance of the accumulation, which must necessarily have exceeded the legal period; it was held by Sir L. Shadwell, V. C., that the direction to accumulate was void, and, consequently, the ulterior dispositions of the will failed; but that as the testator had shown an intention to devote his property to charitable purposes, he directed the intention to be carried into effect *cy près*, by means of a scheme. See also *Attorney-General v. Poulden*, 3 Hare, 555.

As to the Periods for which Accumulation may be directed under the Act.

Upon reading the act it will be observed, that there are four periods during which accumulation may be directed;—*First*, for the life or lives of any grantor or grantors, settlor or settlors (see 2 Prest. Ab. 180). *Second*, for the term of twenty-one years, from the death of any such grantor, settlor, deviser or testator (*Bengough v. Edridge*, 1 Sim. 173; *Lewes v. Lewes*, 6 Sim. 304; *Scott v. Earl of Scarborough*, 1 Beav. 154; *Gorst v. Lowndes*,

11 Sim. 434). *Third*, during the minority or respective minorities of any person or persons, who shall be living, or en ventre sa mère, at the time of the death of such grantor, deviser or testator (*Johnson v. Johnson*, 1 Keen, 648; *Harrison v. Harrison*, Ib. 765; *Kime v. Welfitt*, 3 Sim. 533; *Arnott v. Bleasdale*, 4 Sim. 387; *Hulme v. Hulme*, 9 Sim. 644; *Easum v. Appleford*, 10 Sim. 274). *Fourth*, during the minority or respective minorities only of any person or persons, who, under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated. *Haley v. Bannister*, 4 Madd. 275; *Ellis v. Maxwell*, 3 Madd. 549; *Bryan v. Collins*, 16 Beav. 14, 17.

Accumulation will only be allowed for one of the periods permitted by the act. Thus in the case of *Wilson v. Wilson*, 1 Sim. N. S. 288, where there was a direction to accumulate the income of trust funds for twenty-one years after the testator's death, and, at the expiration of that term, during the minorities of the persons entitled under the trusts, it was held by Lord Cranworth, V. C., that the accumulation was only good for those twenty-one years. "The act," observed his Lordship, "says it is expedient that the power of accumulation shall be restricted in manner hereinafter mentioned; that is, no rents or profits of real or personal property shall be accumulated for any longer term than period A., or period B., or period C., or period D. Surely, an accumulation during period B., and at the end of that period, or further accumulation during period D., is an accumulation beyond any permitted period. The defendants would read the act as if it had restrained accumulation beyond periods A., B., C. and D., not reading the word 'or' in its ordinary disjunctive sense, but as a copulative. This, however, is taking a liberty with language which, I apprehend, is never done, certainly not in modern times, where there is nothing in the context showing that to have been the sense in which the word has been used. It is admitted, that there is no authority directly in point; but in the absence of direct authority, I think the observations of Lord Eldon, in *Griffiths v. Vere*, are entitled to very great weight. The scope of his observations there was, that, in spite of the act, accumulation might go on, partly under the act, and partly under the general principles of law, for nearly double the period of twenty-one years; and he adds, though the legislature did not mean that, that is, though the legislature has by enactment restricted accumulation to a period of twenty-one years from the death of the testator, yet general principles of the law may carry it through a far longer period. This, surely, is very strong to show that Lord Eldon's opinion was, that the statutable accumulation, if it may be so designated, must have stopped at the end of twenty-one years; otherwise, he would have pointed out the subsequent accumulations which, according to the argument before me, might go on, consistently with the statute, for a succession of minorities after the expiration of twenty-one years."

And the same construction must be put upon the act, when the accumulation is directed by a deed as by a will. Thus in a case where Lady Rosslyn transferred a sum of stock into the names of trustees, and by a deed directed them to accumulate the dividends during the joint lives of a person and his wife, it was held by Sir L. Shadwell, V. C., that the settlor was not at liberty to take all the periods of the act as making one period, and that the direction was good for so much only of the joint lives as expired between the date of the deed and the settlor's death. "After reading over the statute," said his Honor, "and the judgment of Lord Eldon in *Griffiths v. Vere*, the conclusion which I have come to is, that the trust for accumulation ought to be held to be good for so much of the joint lives as expired during Lady Rosslyn's life; and that it ought to be held void for the remainder." *Rosslyn's Trust*, 16 Sim. 391.

A direction by will to pay out of the testator's property the premiums upon a policy of insurance, effected by the testator upon the life of another person, is valid for the whole life insured, and is not an accumulation by the Thellusson Act (39 & 40 Geo. 3, c. 98) restricted to twenty-one years only. *Basil v. Lister*, 9 Hare, 177.

How far Accumulations are void under the first Section of the Act.

It was argued in the principal case, that the act was to be construed by analogy to the law of executory devises, which were allowed only within certain limits. That as the accumulation might by *possibility* last longer than twenty-one years the disposition was void; as a limitation over of personal property after a disposition to a man and the heirs of his body is void, without regard to the *possible* event, that they might be extinct within the period allowed by the law. Lord Eldon, however, did not consider that there was any analogy between the law as to executory devises, and the law laid down by the act; in effect that a trust for accumulation, not exceeding the limits allowed to an executory devise, but beyond the limits allowed by the act, is void, not wholly but only *pro tanto*. The distinction is forcibly put by Lord Eldon in a subsequent case. "The true doctrine," says his Lordship, "seems to be, that of a trust for accumulation, which, prior to Lord Loughborough's Act, would have been good, so much as is now within the act will be good, but the excess will be bad; but if there be a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act." *Marshall v. Holloway*, 2 Swanst. 450; and see *Lord Southampton v. Marquis of Hertford*, 2 V. & B. 54.

The decision of Lord Eldon in the principal case has been adhered to in subsequent cases. Thus in *Longdon v. Simson*, 12 Ves. 295, where accumulation was directed until legatees not then born attained twenty-one, Sir W. Grant, M. R., held the direction to accumulate good for twenty-one years from the testator's death, but void for the excess beyond that period. "Suppose," said his Honor, "instead of a life, with regard to which there

might be some uncertainty, the testator had said, the accumulation should continue twenty-four years, it would be good for twenty-one years." See also *Haley v. Bannister*, 4 Madd. 275; *Cranley v. Cranley*, 7 Sim. 427; *Pride v. Fooks*, 2 Beav. 430; *Miles v. Dyer*, 8 Sim. 330; *O'Neil v. Lucas*, 2 Keen, 313; *Eyre v. Marsden*, Ib. 564; *Williams v. Nixon*, 2 Beav. 472; *Blease v. Burgh*, Ib. 221; *Ellis v. Maxwell*, 3 Beav. 587.

Although accumulation may not commence according to the directions of a testator for many years after his death, as, for instance, upon the death of a tenant for life or an annuitant, the accumulation nevertheless under the act must cease at the expiration of twenty-one years from the testator's death. *Webb v. Webb*, 2 Beav. 493; *Attorney-General v. Poulden*, 3 Hare, 555; *Nettleton v. Stephenson*, 3 De G. & Sm. 366.

The day of a testator's death will be excluded in computing the term for accumulation. Thus where a testator directed that the income of his property should be accumulated for the term of twenty-one years from his death, and died on the 5th of January, 1820, it was held by Sir L. Shadwell, V. C., that in the computation of the term the day of his death was to be excluded, and consequently that dividends which became due on the 5th of January, 1841, were subject to the trust for accumulation. *Gorst v. Lowndes*, 11 Sim. 434.

Although any direction to accumulate after the legal period will be considered as struck out of the instrument, other directions, though operating upon the property out of which the accumulations are directed to proceed, will be good. Thus in *Pride v. Fooks*, 2 Beav. 430, where property was directed to be accumulated for such children as a certain person should have at his death, with power to the trustee to apply such part of the income as in his judgment might be proper for their education and maintenance during their minority, and for their future advancement in life, it was held by Lord Langdale, M. R., that although the period for accumulation under the act had expired the power of maintenance and advancement still continued. "The act," said his Lordship, "which prevents accumulations applies only to that which was meant to be accumulated,—to the residue after the purposes which continue lawful are answered; not to anything which it was within the duty or the legal competence of the trustee to do, as against the accumulation, if the accumulation had been allowed to proceed; a great difference is indeed effected in the parties who are interested to oppose any application of the income which would otherwise have accumulated, but no difference in the power or duty to apply the income in a mode directed by the will, which continues lawful." See also *Eyre v. Marsden*, 2 Keen, 574; *Ellis v. Maxwell*, 3 Beav. 587.

As to the Persons entitled to the Income which according to the Statute cannot be accumulated.

The period for the distribution of accumulations will not, it seems, be accelerated by the operation of the act in cutting down the duration of the

period for which accumulations have been directed to be made. *Nettleton v. Stephenson*, 3 De G. & Sm. 366.

The excess of accumulation will, where there is a clause containing a residuary devise or bequest, fall into such residue, it being a gift to the residuary devisee or legatee of everything not effectually disposed of by the will (*Ellis v. Maxwell*, 3 Beav. 587; 12 Beav. 104, 110; *Jones v. Maggs*, 9 Hare, 605). In the absence however of such clause, or if there be one, and accumulation be directed by it, the excess of accumulation, as in case of intestacy, so far as it arises from real property, will go to the heir-at-law (*Nettleton v. Stephenson*, 3 De G. & Sm. 366); so far as it arises from personal property to the next of kin (*Eyre v. Marsden*, 2 Keen, 564; 4 My. & Cr. 431) of the testator. See *Greene v. Potter*, 2 Y. & Coll. C. C. 517.

In the event, however, of the excess of accumulation of real estate being a chattel interest, although it will go to the heir, nevertheless upon his death it will devolve upon his personal representatives. Thus in *Semell v. Denny*, 10 Beav. 315, where a testator devised his real estate to trustees in fee to accumulate until the youngest child of his niece attained twenty-one, and then to divide it. After the expiration of twenty-one years, and before the youngest child attained twenty-one, the heir of the testator died. Lord Langdale, M. R., in giving judgment, said, "The act requires you to strike out of the will the excess of accumulation; and the consequence is, that the heir-at-law of the testator takes, as undisposed of, the rents accruing beyond the time allowed and until the youngest child attains twenty-one. But I am of opinion that this was but a limited and chattel interest, which on the death of the heir-at-law passed to her personal representative." If the interest which came to the heir in such case was an estate of freehold, on his death previous to 1 Vict. c. 26, it would go to his heir (*Halford v. Stains*, 16 Sim. 488); on this death subsequent to that act, to his personal representatives. *Ib.* s. 6.

First Exception as to Provisions for Payment of Debts.

With regard to the construction to be put upon the second section of the act, viz. "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons," Sir G. Turner, V. C., in the case of *Barrington v. Liddell* (10 Hare, 429), was of opinion that the words "or other person or persons," having reference to the first section of the act, did not mean that a testator or grantor might provide for the debts of anybody but himself, but that they meant that any other person or persons might provide for his or their *own* debts. Lord St. Leonards, however, when the case came before him on appeal (2 De Gex, Mac. & Gord. 480, 496), said that he could not come to the same conclusion. That he was of opinion that the true construction was to read the whole as one sentence. "A man," said his Lordship, "may by his will provide for the debts of *himself* or *anybody else* within the old limit: it is a

praiseworthy thing to pay debts, and a man is not likely to provide gratuitously for the debts of any indifferent person, though he is very likely to provide for the debts of a father or son. The legislature then meant, that a man should, within the limit allowed by law, be able to provide not only for his own debts but for the debts of such other persons as he should think fit, it being perfectly certain that the power was one which it would not be very dangerous to intrust to anybody. It is clear, also, that the provision as to debts must relate to past debts, and nobody can deny that, a man being able by his will under this act to provide for his debts generally, this will include his future debts."

In *Bateman v. Hotchkin*, 10 Beav. 426, a testator devised his real estate, subject to a term of 2000 years, to his son for life, with remainder to his first and other sons in strict settlement. The trusts of the term were that the trustees thereof should raise 500*l.* a year, and accumulate it as a sinking fund for payment of his mortgage debts. It was held by Lord Langdale, M. R., that as the trusts for payment of debts came within the exception of the act, and as the first tenant in tail on coming of age might acquire absolute dominion over the estate subject to the mortgages, so that the trustees of the term would become his trustees as owner of the estate, the trust for accumulation, though unlimited in its duration, was valid. "The period," said his Lordship, "during which the attainment of full power over the estate is suspended is permitted by law; and the accumulation, except at the will of the owner, can continue only during that lawful suspension; and considering this case to be within the exceptions of the statute, it does not appear that I can hold the term and the trust for accumulation to be void for remoteness."

Second Exception in favour of Portions.

The word "portions" in the second section will be construed as extending to "portions" existing independently of the instrument directing the accumulation (*Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 480; *Middleton v. Losh*, 1 Sm. & Giff. 61), and also to portions created by it. Thus in *Beech v. Lord St. Vincent*, 3 De G. & Sm. 678, the testator devised estates to trustees for ninety-nine years, upon trust to raise *during so much of the life of his only son* as should fall within twenty-one years from the testator's death, and also *during such time of his son's life*, as there should be in existence any younger children or child of his son, an annuity or yearly sum of 2,000*l.*, and to invest and accumulate such sum, and to stand possessed of the same and of the accumulation thereof, upon certain trusts thereby declared in favour of the *son's* younger children; and, subject to the term, the estates were devised to the use of the son for life, with remainder to the use of his first and other sons successively in tail, with remainders over. It was held by Sir J. L. Knight Bruce, V. C., that the trust for accumulation came within the exception of the second section, as being a provision "for raising portions" for the child or children of the son who took

an interest under the devise, and that such trust was valid *independently* of the act, it being confined to a life in esse; viz., that of the testator's son. "It has been suggested," said his Honor, "as doubtful whether the word 'portions' in this section can be construed as confined to 'portions' existing as charges independently of the instrument in question. I think that the word may well extend to a fund appropriated to the purpose of raising future portions, which only have their existence under the instrument itself. The next question is, whether the term 'portion' is properly applicable to a gift of this description. . . . I am of opinion that such a provision is a portion; and therefore the word 'portion' is correctly applicable to it. The next question is, as to the persons for whom this provision is made. They are clearly the children of a person taking an interest under the instrument, and therefore within the provisions of the section."

In the case of *Halford v. Stains*, 16 Sim. 488, the testator directed the rents of his freehold estates and the income of his residuary personal estate to be accumulated, in order to provide for the younger children of his niece, and of another person, each of whom took an interest under his will; and in the clauses for the maintenance and advancement of the children he termed the provision he had so made for them sometimes *their portions*, and sometimes *their portions or shares*. It was held by Sir L. Shadwell, V. C., that the provision for the children was not a "portion" within the second section of the act. His Honor was of opinion that the portions spoken of in the act seemed to him to be portions charged on property under some instrument prior to the will, and from which the provision made by the will was intended to relieve that property. Besides the testator had put his own interpretation on the word "portion," he had shown that he meant by it a "share." See *vide Bourne v. Buckton*, 2 Sim. N. S. 96.

In *Jones v. Maggs*, 9 Hare, 605, the testatrix gave to trustees the residuary estate, upon trust to invest 200*l.* in 4*l.* per cent. annuities, and to accumulate the dividends until the youngest child of her brother should attain twenty-one, on which event it was to be divisible among her brother's children; and the testatrix gave the residue, after the investment of the 200*l.*, to her brother. It was held by Sir George Turner, V. C., that the 200*l.* given by the testatrix was not a "portion" within the meaning of the second section, and that the accumulation was therefore void after the expiration of twenty-one years, as not coming within the protection of that section. "I see no reason," said his Honor, "for putting a strained interpretation upon the expression 'portions for children' used in this act. It would be contrary to the policy of the act to do so, and would afford a ready means of escaping from its provisions. Is this then a provision for raising portions within the fair meaning of the act? I think not. Portions for children are, I think, generally understood to be sums of money *secured to them out of property springing from or settled upon their parents*; and, although there may no doubt be cases in which the parents take no interest, may well be called portions. I think that such provisions would only receive that designation

where the nature or context of the instrument gives them that character. Where there is a gift to children both of capital and income, and there is nothing in the nature or context of the instrument to impress upon the gift the character of a portion, I do not think it would be called a portion in the ordinary sense of the word, or ought to be so considered within the meaning of this act of parliament; and the cases of *Eyre v. Marsden* (2 Keen, 564) and *Bourne v. Buckton* (2 Sim. N. S. 91) support this view. In the present case the whole of the 200*l.*, with all the accumulations upon it, is given to the children; and there is clearly nothing in the nature of the instrument, by which the gift is made, to impress upon it the character of a portion.

"It was said, however, that the context of the will impressed that character upon the gift, as the residue is given to the parent, and the legacy would be a deduction from the residue; but when it is said that the legacy is a deduction from the residue, it is so in no other sense than that the residue would be greater if the legacy was not given. The legacy is given out of the general estate, and not out of the residue, and if this legacy is to be construed to be a portion, every legacy given to a child of a residuary legatee must, as it seems to me, be so construed, and thus the act be wholly defeated.

"The case of *Beech v. Lord St. Vincent* has not, I think, any bearing upon the question. There the parent took the estate out of which the provision for the children was made, and the provisions for the children had in every respect the character of portions." See *vide Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 500; *Burt v. Sturt*, 10 Hare, 415; *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 40; *Middleton v. Losh*, 1 Sm. & Giff. 61.

A direction to accumulate all a person's property, or even the residue, (after certain specific devises or bequests), for the benefit of an infant, is not a provision for raising portions within the meaning of the second section. See *Eyre v. Marsden*, 2 Keen, 564; *Bourne v. Buckton*, 2 Sim. N. S. 91; *Wildes v. Davies*, 1 Sm. & Giff. 475; *Burt v. Sturt*, 10 Hare, 415. In *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 40, Lord Chancellor Cranworth made the following important observations:—"If I am asked," said his Lordship, "what the raising of portions is, I confess myself in extreme embarrassment and difficulty, which I cannot at present surmount. It is, however, sometimes possible to say that a thing is not, although it may be extremely difficult to define what that thing is. Thus, whether under any circumstances the gift of a residue should be called giving a portion, I am not now required to decide; but I think that a direction to accumulate all a person's property, to be handed over to some child or children when they attain twenty-one, can never be said to be a direction for raising portions for the child or children; it is not raising a portion at all, it is giving everything. 'Portion' ordinarily means, as has been observed during the argument, merely a part or a share; and though I do not know that the gift of a whole might not, in some circumstances, come under the term of a gift of a

portion, yet I do not think it comes within the meaning of a portion in this clause of the act, which points to the raising of something else for the benefit of some children or class of children. This is the way in which the matter strikes me; and although I confess that it certainly is not entirely satisfactory to my mind, being merely a negative definition, it is sufficiently satisfactory to enable me to act on the present occasion; and I accordingly do not think that a gift of a *residue* to accumulate is a provision for the raising of portions within the meaning of the second section of the act. In truth, if it were so, the whole act would fall to the ground at once. It has indeed been often remarked, that the act is very easily invaded; but if every direction for accumulation for a child was a portion, the intention of the legislature, which was to prevent accumulations, such accumulations being most directed for the benefit of children, would be entirely defeated." See the observations of Bosanquet, J., in *Shaw v. Rhodes*, 1 My. & Cr. 154: S. C. 5 C. & F. 114, nom. *Evans v. Hellier*.

Portions already created, as well as future portions, are intended, although without the words "for raising portions;" the clause rather looks to future provisions than to any already created. *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 498. Per Lord St. Leonards, C.

The words "child or children," in the second section of the act, are not to be confined to children born at the time the instrument creating the trust for accumulation came into operation, but may be extended to children thereafter to come into existence. *Beech v. Lord St. Vincent*, 3 De G. & Sm. 685.

It is perfectly clear, that whatever a grantor or settlor may do with regard to his own children, he may do with regard to the children of any other person as to past portions or future portions; because there is no distinction between them, except that the persons whose children may have portions provided for them by a grantor, settlor or devisor must be persons who take an interest under "such conveyance, settlement or devise." *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 499. Per Lord St. Leonards, C.

It is not necessary that the gift to a person who is to take an interest under the conveyance, settlement or devise must be by the very clause which creates the portion. *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 500.

Much discussion has arisen upon the subject, what is "an interest" under a conveyance, settlement or devise within the meaning of the second section, so as to bring a provision for raising portions for any child or children of such person within the meaning of such section.

It seems that however small may be the sum which is given to the parent of children for whom portions are provided, it is an interest within the meaning of the act, and that it is not necessary that it should arise from the property to be accumulated. Thus in the case of *Evans v. Hellier*, 5 C. & F. 126, before the House of Lords, when counsel, arguendo, said, "that the interest of parents was not to consist of a mere legacy of small amount, the legislature could not have meant, that if the parent took a

legacy of a horse or one pound under the will, that was such an interest in the estates as would bring the charge within the exception of the act." Lord Lyndhurst observed, "I think the meaning of 'any interest' is any interest, however minute;" and upon counsel proceeding to argue that the act would be nugatory if an interest of such small amount could bring accumulations within the exception, Lord Brougham observed, "Yes, and nugatory also if words in a will, giving even five pounds to the parent during the period of accumulation, would have no effect." See also *Barrington v. Liddell*, 2 De Gex, Mac. & Gord. 505, reversing the decision of Sir G. Turner, V. C., 10 Hare, 429; *Burt v. Sturt*, 10 Hare, 415; *Edwards v. Tuck*, 3 De Gex, Mac. & Gord. 505; sed vide *Eyre v. Marsden*, 2 Keen, 564; *Shaw v. Rhodes*, 1 My. & Cr. 135; *Morgan v. Morgan*, 4 De G. & Sm. 164; *Barrington v. Liddell*, 10 Hare, 429; *Bourne v. Buckton*, 2 Sim. N. S. 100, 101.

Costs.

Under a direction by will to accumulate, and lay out a certain sum of money in the purchase of land, to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 1 Hare, 505.

Where a fund arisen from accumulations of a testator's estate, made after the period prescribed by the act, was claimed by the residuary legatees and by the next of kin, adversely to each other; the Court decided in favour of the next of kin, and ordered the costs of suit to be paid out of the fund composed of the capital of the residue and the lawful accumulations, and out of the fund in dispute, pro ratâ. *Elborne v. Goode*, 14 Sim. 165.

CORBYN v. FRENCH.

Feb. 14, 16, 18, 1799.

[REPORTED 4 VES. 418.]

CHARITIES—MORTMAIN ACT, 9 GEO. 2, c. 36.]—*Legacy to the trustees of a chapel for Protestant Dissenters, to be applied by them towards the discharge of the mortgage on the said chapel, is void under the statute of 9 Geo. 2, c. 36. The mortgage having been paid off by other funds in the testator's life, the Court would not say the legacy might not have been applied in repairing or sustaining the chapel, but was of opinion it could not be applied to any other charitable purpose.*

Bequest of the residue to A. for life, and after her death legacies were given to B., or to her proper representative, in case she should not be living at the decease of A., and to four other persons or their representatives or representative; one of the four died in the life of the testator, and another survived him, but died in the life of A.; the former lapsed; the latter vested.

JOHN BROWN, by his will, dated the 18th of June, 1785, after giving some specific and pecuniary legacies, gave and bequeathed the residue of his property in the following manner:—

“ The rest and residue of my estate and effects, of what kind soever, I direct may be disposed of, and the money arising from the sale to be paid unto my said trustees, to be by them invested in the public funds, or in some other good security at their discretion, and the interest thereof to be paid to my dear wife, Elizabeth, during her natural life; at her decease I direct that the sum of 500*l.* be paid to the trustees of the chapel in Essex Street (whereof the Reverend Mr. Lindsay and the Reverend Doctor Disney are ministers), to be applied by them *towards the discharge of the mortgage on the said chapel*: And I further give and bequeath to my aforesaid niece

Elizabeth Cooper the sum of 2,000*l.*, or to her proper representative, in case she should not be living at the decease of my wife. I also give to each of the children of my sister Elizabeth, viz. John, Dorothy, William and Christopher, or their representatives or representative, the sum of 2,000*l.* The remainder I direct to be equally divided between Josiah Messer aforesaid, and John, the son of my very worthy and much respected friend and partner, Thomas Corbyn, share and share alike."

The testator appointed — French and Josiah Messer, whom he had nominated as trustees, and — Stacey, to be his executors.

By a codicil, dated the 13th of August, 1787, after giving some legacies, he proceeded thus:—

"At the decease of my dear wife I give unto Thomas Rogers, Matthew Twogood and Michael Dodson, Esquires, treasurers to the new Academical Institution among Protestant Dissenters, or to the treasurers at the time, the sum of 2,000*l.*, to be by them applied upon the purposes of the said institution, the remainder, after payment of all legacies, &c., as before directed by my will."

The testator died in 1788, Elizabeth Brown, his widow, died upon the 24th of December, 1797.

John Barker, one of the children of the testator's sister Elizabeth, died during the life of the testator; leaving a widow and children. Christopher Barker, another son of the testator's sister, died soon after the death of the testator, but during the life of his widow.

The bill was filed by John Corbyn, one of the residuary legatees, praying an account of the personal estate, debts, &c.; that the said two legacies of 2,000*l.* each, given to John and Christopher Barker, and also the legacy of 500*l.* to the trustees of the Essex Street Chapel, and the legacy of 2,000*l.* to the treasurers of the Academical Institution for Protestant Dissenters, may be declared void and to have fallen into the residue.

The trustees for the chapel in Essex Street by their answer stated, that they believe the chapel, or the equity of redemption thereof, subject to a mortgage, upon which was then due the sum of 886*l.* 10*s.* and some interest, was in January, 1783, conveyed to and vested in certain trustees in fee simple, for the public worship and service of Almighty God therein; and that the said chapel and premises belonging to the same were on or about the 25th of March, 1779, conveyed to the defendant Godfrey Kettle, in fee simple, for the purpose of securing the

repayment of 1,000*l.* and interest: which principal sum had been previously advanced by the Rev. Theophilus Lindsay upon the security of the said premises, and for whose benefit Godfrey Kettle was a trustee.

They admit that on or about the 6th of December, 1781, the sum of 113*l.* 10*s.*, part of the said sum of 1,000*l.* was paid off and discharged; and that the sum of 886*l.* 10*s.*, being the remainder of the said sum of 1,000*l.*, was paid off and discharged on or before the 19th of March, 1785, by a donation by one Mr. Brooksbank; and that the same premises were reconveyed by the defendant Kettle by the direction of Theophilus Lindsay to the persons who were at that time trustees of the chapel; and they say the said mortgage was so paid off and discharged in the life of the testator and before the date and execution of his will.

The bill stated that the Academical Institution mentioned in the codicil was formed for teaching and promoting certain religious tenets and sentiments which differ from the established religion; that certain lands at Hackney were vested in trustees for the purposes of the said institution; and part of the institution was, that it should be for ever carried on upon the said premises. The bill then suggested that at the death of Elizabeth Brown the institution had ceased; but upon the answers of the trustees this part of the bill was given up.

The questions were, first, whether the legacy to the Essex Street Chapel was void within the statute (a).

Secondly, if the legacy was not void by the statute, whether, the express purpose of it having been satisfied by other means, that institution could have the benefit of it for any other purpose.

Thirdly, whether the legacies to John and Christopher Barker, or their representatives, failed in consequence of their deaths.

Mr. *Owen* for the plaintiff and Mr. *Richards* for the defendant Messer, the other residuary legatee. The question upon the statute seems so clear that it is scarcely possible to argue it without hearing what can be said in support of the legacy. It cannot be distinguished from a bequest of a term for years, or a direction to the trustees to purchase a term for years. In *Widmore v. The Governors of Queen Anne's Bounty*, 1 Bro. C. C. 13 n., 33 n., the legacy was held void upon the ground that now, by the regulations that corporation has made, everything given to them must be laid out in land. There is no dif-

(a) 9 Geo. 2, c. 36.

ference between giving a mortgage to a charity and giving a sum of money to be laid out upon a mortgage. There is an apparent distinction between this case and those in which gifts of money to be laid out upon land already in mortmain have been sustained; as where money is bequeathed to beautify or repair a chapel already erected.

Upon the second question, supposing this legacy not void by the statute, the mortgage having been paid off, and therefore the object of the legacy not being in existence, it is adeemed like a legacy of a horse, which does not exist at the death of the testator. The particular object cannot now be answered. There is no such incumbrance to be removed. The legacy is given only for the special purpose of paying off that incumbrance, not for the general purposes of the institution. There is no intimation of an intention to give them this legacy, in case the mortgage was removed. If a legacy is given for the purpose of building a church, and they will not take it for that purpose, the legacy is gone. *Attorney-General v. The Bishop of Oxford*, 1 Bro. C. C. 444, n. (b).

There is no general charitable intention, under which the crown can have a right to appoint, the particular purpose having failed. It may be doubtful whether this institution is a charity. It is to support a chapel in which are to be received such persons as choose to attend their mode of worship differing from the established church. Is that a charity; and shall this fund go as a sum devoted generally to charitable purposes, and to be applied by the crown? The particular object has failed: there is no intimation of any other; and there is no general charitable purpose.

Upon the third question, both the legacies to John and Christopher Barker have failed by the death of the former during the life of the testator, and of the latter during that of his widow. In *Cooper v. Thornton*, 3 Bro. C. C. 96, 186, the children took an immediate interest. It would be going a great way to insert the words "in case of the deaths in my life or the life of my wife," especially as the legacy immediately preceding contains such a provision. It is like a legacy to a person who does not exist. *Maybank v. Brooks*, 1 Bro. C. C. 84; *Hutcheson v. Hammond*, 3 Bro. C. C. 128.

Mr. *Pigott* and Mr. *Romilly*, for the trustees of the Essex Street

(b) See the end of that cause stated in the judgment from the Registrar's Book.

Chapel, defendants.—This is undoubtedly a charitable purpose. *Attorney-General v. Cock*, 2 Ves. 273.

As to the objection upon the statute, this is an interest in land already in mortmain; therefore it does not fall within the authorities, that a mortgage, or a lease, or a rent, is within the statute. That only holds where the land is not already in mortmain; but you may lay out money upon land already in mortmain. It was not the object of the statute to prevent land already in mortmain from being improved. The object was to prevent *new* land from being brought into mortmain. It is assumed, that giving money to pay off a mortgage is exactly the same as if the mortgagee was to give the mortgage; but it would not be unlawful for a mortgagee to give the mortgage directly, if the land was already in mortmain. The mortgagee might by his will have given the mortgage to these trustees, having the equity of his redemption. A mortgage is certainly considered merely as a debt; though in strictness the mortgagee has the legal estate. A devise of a mortgage would be only removing the incumbrance, and improving property already in mortmain. It would not be bringing new land into mortmain, and to prevent that is the principle of the statute, as Lord Camden held in *Widmore v. The Governors of Queen Anne's Bounty*; and that distinction, that a bequest of money to be laid out in land is good, if the land is already in mortmain, and void if not, prevailed in *Brodie v. The Duke of Chandos* and *The Attorney-General v. Hutchinson (c)*, and in other cases. *Glubb v. The Attorney-General*; *Harris v. Barnes*, Amb. 373, 651; *Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 444. The statute had two objects; first, to prevent the disinheriting of heirs; secondly, to prevent putting lands into a state of perpetuity. The principle with respect to the second object is, that the land is taken out of circulation. Upon that principle it has been decided, that a bequest of money to be laid out upon land already in mortmain, no matter to what amount, is good. That principle reaches this case. Where property is given to disencumber an estate already in mortmain, it is in point of principle the same as if it is given to improve land already in mortmain. The Court have gone so far as to say, that where the land is given by another person, the money may be used; so, where the body, for whose benefit the bequest is made, had land already in mortmain. The Court have availed themselves of

(c) Cited in *The Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 444.

all those distinctions, and have constantly said the bequest should be supported, unless it is to purchase land and bring new land into mortmain.

Many cases upon the statute are to be looked on as cases of positive law, and are not within the principle.

Upon the second point, this disposition was intended substantially for the benefit of the chapel. The application of the money is directed to that, which the testator might think the most urgent purpose; but the existence of the mortgage is not of the essence of the gift. The gift is to the trustees. The application is to be by them, not by the executors. It would be a singular construction that, because the testator has pointed out the mode in which he wished this legacy, intended substantially as a benefit to the chapel, to be applied, that should be turned into a condition precedent in a Court of Justice, which is favourable to charities. The direction to apply the money distinguishes between the objects and the mode, a distinction frequently laid down by Lord Thurlow. The object was the chapel. The application directed was only the mode; that which the testator thought the best application for the benefit of that object. This differs essentially from *The Attorney-General v. The Bishop of Oxford*; there was no election to repair the church, or to build the chapel; the only object was to build a church. In such cases vanity is the object of the testator; to raise a monument to his own name: but it cannot be said this testator had any such intention of commemorating himself. The ademption of a legacy depends upon the testator, who must do some act to adeem; as where a specific legacy is sold by the testator. According to this argument, it would depend upon the act, not of the testator, but the trustees; upon the accident, whether they should apply any other fund to pay off this mortgage or not. Suppose it had been paid off in part only by Brooksbank's donation; upon this ground it must be contended, that the legacy is good only to the extent of what remained due. They might go farther, and say nothing was due.

Consider this as a legacy to an individual, to be applied towards paying off a mortgage supposing him seised in fee. It would be considered as a legacy for his benefit; and if he did not want it for the purpose of paying off the mortgage, the Court would never compel him so to apply it. There are not many cases to be found upon the subject. In 2 Leon. 154, and 3 Leon. 65, the devise of a rentcharge to a son towards his education and bringing up in learning was held

not conditional. The same construction was made upon a legacy to place a boy out apprentice, in *Barlow v. Grant*, 1 Vern. 255, and *Nevill v. Nevill*, 2 Vern. 431. There are, however, many cases in this Court of the same nature; as where a legacy is given for the maintenance and education of children, it has been ordered to accumulate for their benefit, if the father is of ability to maintain them (*d*). So upon a legacy for mourning, or for a ring, it has never been held that the legatee is to be compelled to that application.

It must be said, that the only wish of this testator was, that there should be no mortgage upon this chapel, but he did not care for the benefit of it in any other respect. That is not a rational object, nor could it be attained; for suppose the trustees thought any other mode better, they might pay off the mortgage and immediately make another, and apply the money to any other purpose in their opinion more beneficial. Suppose two testators, knowing of this mortgage, had each bequeathed 500*l.* for the purpose of paying it off, what is to be done? Is there to be a contribution? It is perfectly clear the object of both is to advance the general purpose of the charity. This mortgage is not directed to be paid off till after the death of the testator's wife. Suppose the mortgage having been paid off, a second mortgage had been made before the death of his wife. If the case bears any resemblance to the cases of ademption, the legacy could not be applied to that mortgage; but there can be no doubt, there being at the time the Court was to act upon it a mortgage, the charity wanting the legacy for the express purpose for which it was given, the application would be made.

Mr. *Hubbersty*, for the representatives of John and Christopher Barker.—As to the legacy to John Barker, the word “or” distinguishes this case from *Maybank v. Brooks* and *Hutcheson v. Hammond*. That word may make a difference: *Stone v. Evans*, *Lowther v. Condon*, 2 Atk. 86, 127. The former turned upon the clear intention to give to the sister as executrix. In the latter, I admit, an intention appeared that the legacy should not lapse. In *Buffar v. Bradford*, 2 Atk. 220, a legacy to A. and the children born of her body survived to a child born after the date of the will. In *Sibley v. Cook*, 3 Atk. 572, the

(*d*) *Andrews v. Partington*, 3 Bro. C. C. 60. But as to the strict rule that prevailed in that case, see *Hoste v. Pratt*, 3 Ves.

730, and *Mundy v. Earl Howe*, 4 Bro. C. C. 223.

legacy did not lapse. That case was noticed by the Court in *Bridge v. Abbot*, 3 Bro. C. C. 224.

As to the legacy to Christopher Barker, who survived the testator, but died in the life of his wife, the case is stronger.

Mr. Owen, in reply.—By the express words of the will, the application is confined to that particular mortgage. Paying off that mortgage is in other words purchasing a term of 500 years in land. It is so considered by the defendants, who contend that a devise of the mortgage itself would be good; but the statute is not confined to land, but extends to any interest in land. This is absolutely an estate in land. How are the trustees to get this estate? After a certain time it is an absolute estate in the mortgagee. Upon a bill for redemption, there must be a reconveyance of the legal estate. There is not an end of it merely by paying the money. In the case of a legacy to A. for the benefit of his children, the children are the sole object; and if they die there is an end of it. So in this case the paying off this mortgage is the sole object. It is incumbent upon these trustees to show a trust, to which this legacy is to be applied.

As to the third question in *Sibley v. Cook*, the testator declared in terms, that none of the legacies should lapse. It was there held, that there must be a clear intention that the legacy shall not lapse; and also, that the persons intended to take must be distinctly pointed out. These cases were considered in *Bridge v. Abbot*, and this Court adopted that principle, which was also followed by the Court of Exchequer in *Evans v. Charles*, 1 Anst. 128, which went upon particular circumstances, and by the Lord Chancellor in *Long v. Blackall*, 3 Ves. 486.

Sir R. P. Arden, M. R.—This is certainly a charity. I feel great difficulty in saying this is not an interest in land. If the mortgage itself was devised to a charity, it would be clearly void. The executor would be deprived of an interest in land; and that interest would be given by will to a charitable purpose.

In the *Attorney-General v. Andrew* (3 Ves. 633), the Lord Chancellor has thought it not clear that the charitable disposition shall not be carried into execution, though Trinity College refuses it; and it was referred to the Master with that view. I suppose that proceeded from the double object, and the interest of the other party,

Merchant Taylor's School. It may be inferred, that if the testator had known the college would not have accepted it, he would have provided for the other object.

If a trustee for a charity had contracted for the purchase of an estate, would not a sum of money, bequeathed to enable him to complete that purchase, be within the statute?

For the Trustees.—I should feel a difficulty in the case of a contract only. The trustee would have only an equitable estate; but a mortgagee is always considered as owner of the estate, with an incumbrance upon it.

The Master of the Rolls was inclined to direct an inquiry into the nature of this chapel; but afterwards observing, that it appeared by the will that there were ministers, he seemed to think that would prevent the necessity of the inquiry. However, it was admitted on both sides, that this chapel was used for the purpose of public worship, by a society of Protestant Dissenters, and was duly licensed under the Toleration Act.

Sir R. P. Arden, M. R.—The question as to the legacy of 500*l.* under this will is, whether, under the late statute (e), or on account of the nature of the application of the money to the particular purpose therein mentioned, it is good or void.

It is insisted, that this being in its nature a charitable use, the bequest of this money to be applied in redemption of the mortgage is within the Statute of Mortmain, commonly so called, but very improperly; for it does not prevent the alienation of land in mortmain; nor was that the object of the act. It has nothing to do with that. The object was to prevent devises of land, or any interest in land, or bequests of money to be laid out in any such interest, for any charitable use whatsoever.

It is likewise insisted, that if this legacy is not void under that statute, inasmuch as at the death of the testator the mortgage was paid off, and therefore that object cannot now be attained, it is not applicable to any other purpose for the benefit of that society; and as the object pointed out by the will cannot arise, the fund will belong to residuary legatees. I am in their favour upon both points; but it is not necessary to dwell long upon the second, if I am right upon the first.

It was insisted, and with success, that though the construction of this

(e) 9 Geo. 2, c. 36.

statute has been extremely rigorous, and many determinations upon it have been thought to carry it even beyond what the legislature had in contemplation at the time; as, for instance, when part of a residue given to a charity consists of mortgages, or other securities upon land, though it was held, that it was not an immediate gift of an interest in land, being only what should remain after the debts were paid, and it was melted into money, it was determined that, as to so much of the residue as consisted of securities upon land, the charity could not take any part of the residue so constituted (*f*); yet there have been repeated determinations, that it is competent to a testator, though not to give directly any interest in land to a charitable use, to leave a sum of money for the purpose of meliorating, as it is called, any land, or for beautifying, sustaining or repairing buildings already vested in trustees for charitable uses; and no doubt, I believe, is now entertained upon it; and many cases have been determined upon the distinction, whether it is clear the testator meant the money to be applied in erecting, sustaining or repairing buildings, upon land already vested in trustees for charitable uses, or had any object of having fresh land purchased for that purpose (*g*). It is said, this case is analogous to those cases in which the Court has established, in favour of a charity, a disposition not of an interest in land, or of a sum of money bequeathed for the purchase of any interest in land, but for the purpose of meliorating an estate already vested in trustees for charitable uses. I am of opinion, that cannot be considered as the true construction of this gift. The words of the statute, which go far beyond the title, are very express. It is called an act to restrain the disposition of lands, whereby the same become unalienable. It then recites that gifts or alienations of lands, tenements or hereditaments, in mortmain, are restrained by *Magna Charta*, and other laws, as against the common utility; nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions to uses, called charitable uses (not dispositions in mortmain); and the first clause enacts, that no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the

(*f*) *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581; 3 Ves. 332, 492; *Howse v. Chapman*, 4 Ves. 542; *Knapp v. Williams*, 4 Ves. 430, n.; *Attorney-General v. Caldwell*,

Amb. 635; *Attorney-General v. Meyrick*, 2 Ves. 44.

(*g*) See *Blandford v. Thackerall*, 2 Ves. jun. 238.

purchase of any lands, tenements or hereditaments, shall be conveyed or settled to or upon any person or persons, bodies politic or corporate (that is the only case in which it could be in mortmain), or otherwise for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, &c., of any such lands, &c., money or personal estate (other than stocks in the public funds), be made by deed indented, sealed and delivered in the presence of two witnesses, twelve months before the death of the donor or grantor, and enrolled in the Court of Chancery, within six months after execution; and unless such stocks be transferred six months before the death of such donor or grantor, and unless the same be made to take effect in possession for the charitable use intended immediately, and be without any power of revocation, &c.; and also subject to the provision by the second clause in favour of purchasers *bonâ fide* for valuable consideration.

The third clause enacts, that all gifts, grants, conveyances, &c., of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable use whatsoever, made in any other manner than by the act is directed, shall be absolutely void.

Upon the third clause this question arises, whether this is or is not a legacy to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same? I am of opinion this is directly in words given for that purpose. Without all question, unless the other argument is resorted to, it is a direction to apply this money in the purchase of that interest then affecting those premises. But it is said those premises were already appropriated to the same use for which this mortgage was to be redeemed; and it is further insisted, that if the testator had been himself the mortgagee, and had directly given the mortgage by his will to these trustees, having the equity of redemption, it is something like beautifying, sustaining or repairing buildings, money given to be laid out upon land already vested in trustees for a charitable use: but I deny that. The land was never given to that

charitable purpose. This is an interest in the land never given to that purpose. They had all the estate but this mortgage interest, and the purpose was to give those trustees who had the estate subject to this interest, which is in other persons, a larger and more extensive interest than they had before. I am of opinion it is within the statute. It is nothing but a sum of money given for the purpose of procuring first, and then conveying to the trustees, this further, greater and more extensive interest than they had before. I should be sorry to refine upon the statute, or to be more rigorous in the construction than former decisions warrant: not that I wish to defeat the statute, but I wish fairly to construe it. The Court has gone so far as to hold, that a sum of money secured upon turnpike tolls is an interest in land within the act. This is not like the case of a building. It is very unfortunate that the testator in such a case should have taken this method of giving it, for he might have done it in a more direct way; and I am aware that all these refinements upon the statute are not using it for the purpose for which it was intended. If a man devises his lands to be sold, and directs the money to be applied to a charitable use, the statute says it is void. I put a case, the answer to which I expected. It is said, that if the trustee for a charity has got any interest in land, the increasing that interest or applying money by will to make it good is not an interest in land within the statute. I put the case of the trustee having contracted for the purchase of an estate, and money being left to enable him to complete that purchase. The counsel for the charity could not say that would not be within the statute. Suppose a part of the money was paid and part not, if the whole could not be applied no part could. Where is the difference? Till the mortgage was paid off the trustees had not that purchase. I am therefore of opinion that this sum of money bequeathed to redeem the mortgage upon this chapel is void by the statute.

If I am right upon that point, perhaps the other consideration is immaterial; but as the point was made I will say a few words upon it, for the purpose of having *The Attorney-General v. The Bishop of Oxford*, which has been mistaken, perfectly understood.

It is said, supposing this legacy is not void by the statute, it is not so confined to the purpose of paying off the mortgage, as that, in case that was paid off without the knowledge of the testator, I may not infer an intention under which it may be applied to other beneficial purposes for this society. I confess the inclination of my opinion is

otherwise. The true question is, can any intention be collected beyond that of securing to them the enjoyment of this building; any intention that, after having provided for that object, if the whole was not necessary for that, the surplus should be applied for any other beneficial purpose in favour of the society? I am of opinion no such intention can be collected. I will not say, that if this legacy was not void by the statute it might not be applied to sustaining and repairing that building; but that it can be applied to any other purpose I deny, if *The Attorney-General v. The Bishop of Oxford* is right.

The first decree in that cause was made upon the 13th of July, 1786, and is in the Registrar's Book A. 1785. The decree by the Lords Commissioners in 1792 is in the Registrar's Book 611. The testator, after giving to his executors 100*l.* each for their trouble, gave and bequeathed the rest and residue of his personal estate upon trust "to build a church at Wheatley, where the chapel now is, in such manner as I shall hereafter direct, or, for want of such direction, as my executors shall think fit."

The Bishop of Oxford, who was patron and parson of Cuddesden, in which Wheatley was, opposed the design of building a church; and it was proposed by the defendants that the salary of the chaplain should be increased. The next of kin insisted that a new church must be built, and that the surplus belonged to them. By the first decree it was referred to the Master to take the accounts; and it was directed that the defendants, the Bishop of Oxford, &c., do signify whether they are willing that the residue of the testator's personal estate shall be laid out in building a church at Wheatley, where the chapel now stands, with liberty to lay a plan before the Master how the said residue may be most beneficially applied according to the will of the testator.

Before the cause came on again many transactions had taken place. The next of kin, and the persons entitled to the benefit under the will, the parishioners acting by the bishop and their wardens, came to an agreement that 3,000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church and forming a fund for keeping it in repair; and that 1,000*l.*, other part thereof, should be applied towards augmenting the minister's salary; and that 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. This agreement is recited in the decree; and by consent it was ordered, that the sum of 4,000*l.*

being paid for the purposes aforesaid the residue be paid to the next of kin.

This decree is completely decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree unless they thought the residue was not applicable to any other charitable purpose. I will not say it could not have been applied for repairing or sustaining the chapel; and I doubt whether Lord Kenyon said so; but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose, or any other purpose for the benefit of that parish, except of the nature pointed out, that decree could not have been justified.

If, therefore, this legacy was not void upon the statute I should pause upon the question, whether I could apply it to any other purpose. I see the testator intended it to provide for these persons a place of worship. I see no other intention; and I think I could not apply it to increase the salary of the ministers, or for any other purpose. In looking over these cases, understanding that the question, how far a legacy given to a charitable purpose may be applied to any other purpose than that specified, is now depending before the Lord Chancellor, in *The Attorney-General v. Andrew*, I find that in *Moggridge v. Thackwell* (1 Ves. jun. 469), Lord Thurlow makes this observation: "Baxter's case was very strong; and perhaps would not now be followed. The legacy was deemed to be void, because for forbidden uses; and yet the court thought, that as it was declared to be for charity, it should go to charities to be declared by the Court. I do not mean to state that as an authority; for it is very hard indeed that the Court should give it to other charities, because those which were mentioned could not take." I confess I very much agree with this doctrine.

Declare the legacy of 500*l.* void under the statute 9 Geo. 2.

Another point arising upon this will is as to the legacies given by the testator to the children of his sister Elizabeth, or their representatives or representative. One of those children died in the life of the testator. Another survived the testator, but died in the life of his widow. The question is, whether they are vested and transmissible to the representatives. I am very clearly of opinion the legacy to Christopher Barker is good. This is stronger than the common case of a legacy to A. and his representatives. There those words are surplus-

age; for if the legatee dies before the day of payment it would go to his representatives. But in this case there is a reason for inserting them. This is not an immediate legacy, but after the death of another person. There is therefore an interval in which the legatee might die; and though it vested he might not live to receive it. That addition might be inserted to put it out of doubt; and must mean in case they die in the life of the testator's wife. I desire to be understood to determine it upon that circumstance, that there is a life intervening.

As to the legacy to John Barker, I think the question can hardly be raised upon this will; for see the preceding legacy to Elizabeth Cooper: would not that have lapsed if Elizabeth Cooper had died in the life of the testator? Beyond all question it would. It is nothing more than saying it shall go to her representatives, if she dies before his wife. As to the others, I am of opinion it is nothing more than a gift to them at the death of his wife; but it was intended only as a beneficial interest to them, and must, as such, vest in them before it could be transmissible. The rules upon which the Court proceeds are perfectly established. A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person or his representatives it can mean anything but in case of his death in the life of the testator; but it is perfectly clear that where the fund is given to one for life, and after the death of that person to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator. It is impossible, without transgressing every rule as to vesting, to hold this legacy vested, the legatee not having lived to take the benefit under the testator's will.

The policy of the act of 9 Geo. 2, c. 36, commonly, though (as observed by the Master of the Rolls in the principal case) improperly, termed the Statute of Mortmain, has of late years, been loudly impugned by many parties, but without sufficient reason. Lord Hardwicke's view of the intention and policy of its framers seems to be correct:—"This, though mentioned as a barbarous act," says his Lordship, "is quite otherwise; far from being a prohibition of charitable foundations, it only restrains the

method, leaving the disposition of personal property thereto free. The particular views of the legislature were two:—*First*, to prevent the locking up of land and real property from being aliened, which is made the title of the act; the *second*, to prevent persons in their last moments from being imposed on to give away their real estates from their families. With regard to the *latter view*, it was a very wise one; for by that means, in times of popery, the clergy got almost half the real property of the kingdom into their hands; and, indeed, I wonder they did not get the rest; as people thought they thereby purchased heaven. But it is so far from being charity or piety, that it is rather a monument of impiety, and of the vanity of the founders. As to the other view, it is of the last consequence to a trading kingdom; to which, indeed, the locking up of land is a great discouragement." *Attorney-General v. Day*, 1 Ves. 223; see also *Durour v. Motteux*, 1 Ves. 321; *Vaughan v. Farrer*, 2 Ves. 189; *Attorney-General v. Lord Weymouth*, Amb. 23; *Boson v. Statham*, 1 Cox, 20: *S. C.* 1 Eden, 510.

The object of that act, which is entitled "An Act to restrain the Disposition of Lands, whereby the same become unalienable," appears in the preamble, which after reciting that "Whereas gifts or alienations of lands, tenements or hereditaments in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless, this public mischief has of late greatly increased, by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs," enacts, "That from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, *unless* such gift, &c., of such land, &c. (other than stocks in the public funds), be made by deed indented, sealed and delivered, in the presence of two witnesses, *twelve* calendar months at least before the death of the donor or grantor, including the days of the execution and death, and be enrolled in the Court of Chancery within *six* calendar months after its execution; and *unless* such stocks be transferred in the public books usually kept for the transfer of stocks, *six* calendar months at least before the death of such donor or grantor, including the days of transfer and death, and unless the same be made to take effect in *possession* for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation,

trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him." Sect. 1.

By sect. 2, it is provided, "That nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements or hereditaments, or any transfer of any stock to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion."

By sect. 3, it is enacted, "That all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time, from and after the said 24th day of June, 1736, be made in any other manner or form than by this act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

By sect. 4, it is provided, "That this act shall not extend, or be construed to extend, to make void the dispositions of any lands, tenements or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of Eton, Winchester or Westminster, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of Eton, Winchester and Westminster."

By sect. 5, it is provided and enacted, "That no such college or house of learning, which doth or shall hold or enjoy so many advowsons of ecclesiastical benefices as are or shall be equal in number to one moiety of the fellows, or persons usually styled or reputed as fellows; or, where there are or shall be no fellows, or persons usually styled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning doth or may, by the present constitution of such college or house of learning, consist, shall, from and after the 24th day of June, 1736, be capable of purchasing, acquiring, receiving, taking, holding or enjoying any other advowsons of ecclesiastical benefices by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed

to or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited."

By sect. 6, it is provided, "That nothing in this act contained shall extend, or be construed to extend, to the disposition, grant or settlement of any estate, real or personal, lying or being within that part of Great Britain called Scotland."

This statute, it will be observed, does not interfere with the disposition of pure personalty in favour of a charity.

In examining the subject discussed in the principal case, we may consider, first, what constitutes a charity, especially as contradistinguished from what are termed superstitious uses; secondly, what gifts to charities by deed are valid, as complying with the requisitions of the statute; thirdly, what gifts are invalid, as being made by will, and being either realty or savouring of realty, and therefore against the policy of the statute; fourthly, the construction adopted by Courts of Equity with regard to valid gifts to charities, and herein of the doctrine of *cy près*.

1. *What constitutes a Charity, especially as contradistinguished from Superstitious Uses.*

The term charity, as observed by Sir William Grant, M. R., in its *widest* sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in the Court of Chancery, for there its signification is derived chiefly from the statute of 43 Eliz. c. 4, commonly called the Statute of Charitable Uses. Those purposes are considered charitable, 1stly, which that statute enumerates; or, 2ndly, which by analogies are deemed within its spirit and intendment. 9 Ves. 405.

The charitable purposes enumerated by the statute of Elizabeth are as follows:—"Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea banks and highways; education and preferment of orphans; relief, stock or maintenance for houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes."

Charities coming within the Statute of Elizabeth.

Gifts to the poor either generally (*Attorney-General v. Matthews*, 2 Lev. 167), or of a particular locality (*Attorney-General v. Clarke*, Amb. 422; *Bristow v. Bristow*, 5 Beav. 289; *Attorney-General v. Bovill*, 1 Ph. 762; *Attorney-General v. Wilkinson*, 1 Beav. 370), by which persons receiving parochial relief will not in general receive benefit (*Attorney-General v. Clarke*, Amb. 422; *Bishop of Hereford v. Adams*, 7 Ves. 324;

Attorney-General v. Corporation of Exeter, 2 Russ. 47; 3 Russ. 396; *Attorney-General v. Brandreth*, 1 Y. & Coll. C. C. 200; *The Attorney-General v. Wilkinson*, 1 Beav. 373; *Attorney-General v. Bovill*, 1 Ph. 762; sed vide 2 Russ. 53, 54; bequests to a workhouse (*Attorney-General v. Vint*, 3 De G. & Sm. 704), or hospital (*Corporation of Reading v. Lane, Duke*, 81, 111), to a parish generally (*West v. Knight*, 1 Ch. Cas. 134; *Champion v. Smith, Duke*, 81), to the masters and governors of an hospital (*Mayor of London's Case, Duke*, 83, 111), to the widows and orphans of a parish (*Attorney-General v. Comber*, 2 S. & S. 93), or to the widows and children of seamen belonging to a town (*Powell v. Attorney-General*, 3 Mer. 48); to "poor relations," "poor kinsmen and kinswomen" (*Green v. Howard*, 1 Bro. C. C. 31; *Brunsdon v. Woolredge, Amb.* 507; *Mahon v. Savage*, 1 S. & L. 111), have been held to come within the statute. And a gift for the perpetual benefit of poor relations, may be sustained as a charity, although if it were made to them as individuals it would be void, as contravening the rule against perpetuities (*White v. White*, 7 Ves. 423; *Isaac v. De Friez*, 17 Ves. 373, n.; *Attorney-General v. Price*, 1b. 371).

Again, gifts for the advancement of learning, as "for the benefit and advancement and propagation of education and learning in any part of the world" (*Whicker v. Hume*, 1 De Gex, Mac. & Gord. 506), or to build or erect a school, or free grammar-school (*Case of Rugby School, Duke*, 80, 112; *Gibbons v. Maltyard, Duke*, 111; Poph. 6), even a school for the sons of gentlemen (*Attorney-General v. Earl of Lonsdale*, 1 Sim. 109), or to maintain a schoolmaster (*Hynshaw v. The Coporation of Morpeth, Duke*, 69), or to the masters and fellows of a college (*Plate v. St. John's College, Duke*, 77, 111), or for the foundation of a scholarship (*Rex v. Newman*, 1 Lev. 284), fellowship (*Case of Jesus College, Duke*, 78, 111) or lectureship (*Attorney-General v. The Margaret and Regius Professors in Cambridge*, 1 Vern. 55) in a college at one of the universities, have been held to be charitable within the intent of the statute. And see the case of *Christ's College Cambridge*, 1 Wm. Black. 90; S. C. 1 Eden, 10; Amb. 351; *Attorney-General v. Whorwood*, 1 Ves. 537; *Porter's Case*, 1 Co. 25 b.

A bequest to the widows and children of seamen at a town has been held to mean orphans (*Powell v. Attorney-General*, 3 Mer. 48; and see *Attorney-General v. Comber*, 2 S. & S. 93); and thus, like a bequest for releasing debtors, and for old decayed tradesmen (*Attorney-General v. The Painters' Company*, 2 Cox, 51; *Attorney-General v. The Ironmongers' Company*, 2 M. & K. 576), to come within the express terms of the act.

Charities by Analogy within the Statute of Elizabeth.

With regard to cases not coming expressly within the terms, but which, by analogy, have been deemed within the spirit and intendment of the statute of Elizabeth, may be mentioned, gifts for religious purposes, as for repairs, furniture or ornaments of a church (*Attorney-General v.*

Ruper, 2 P. Wms. 125; *Attorney-General v. Vivian*, 1 Russ. 226; Duke, 109), or to a minister for preaching (*Gibbons v. Maltyard*, Duke, 111; Poph. 6; *Pember v. Inhabitants of Knighton*, Duke, 82, 109; Poph. 139; *Penstred v. Payer*, Duke, 82; 1 Eq. Ca. Abr. 95, pl. 3); for a pension for a perpetual curate (*Attorney-General v. Parker*, 1 Ves. 43; 14 Ves. 7), or for unbeneficed curates (*Pennington v. Buckley*, 6 Hare, 453), augmentations by ecclesiastical persons to small vicarages and curacies (*Attorney-General v. Brereton*, 2 Ves. 426), gifts to Queen Anne's Bounty (*Widmore v. Woodroffe*, Amb. 636; S. C. 1 Bro. C. C. 13, n.; *Middleton v. Clitherow*, 3 Ves. 734), or for the advancement of Christianity among infidels (*Attorney-General v. City of London*, 1 Ves. jun. 243; 3 Bro. C. C. 171); for the distribution of Bibles, and other religious books and tracts (*The Attorney-General v. Stepney*, 10 Ves. 22; and see *Townsend v. Carus*, 3 Hare, 257; *Powerscourt v. Powerscourt*, 1 Moll. 616); for the increase and encouragement of good servants (*Loscombe v. Wintringham*, 13 Beav. 87); for letting out land to the poor at a low rent (*Crafton v. Frith*, 15 Jur. 737; 20 L. J., N. S., Ch., 198), or for deserving literary men who have not been successful (*Thompson v. Thompson*, 1 Coll. 395); for the repairs of chimes and payment of singers of a church (*Turner v. Ogden*, 1 Cox, 316), or for keeping up an organ, and as a stipend for the organist (*Attorney-General v. Oakaver*, cited 1 Ves. 535); in which case, however, Lord Hardwicke held an annuity to choristers of a parochial church not to be a charitable use; nor, it seems, is a bequest for maintaining and keeping in repair family vaults or tombs (*Masters v. Masters*, 1 P. Wms. 422, 423, n. 1; *Durour v. Motteux*, 1 Ves. 320; *Gravenor v. Hallum*, Amb. 643; *Doe d. Thompson v. Pitcher*, 3 Mau. & Sel. 407; S. C. 2 Marsh. 61; 6 Taunt. 359; and see *Mitford v. Reynolds*, 1 Ph. 185, 198; *Mellick v. The President &c., of the Asylum*, Jac. 180; *Adnam v. Cole*, 6 Beav. 353; *Lloyd v. Lloyd*, 2 Sim., N. S., 255; *Willis v. Brown*, 2 Jur. 987); but the authorities are not clear on this subject.

Moreover, gifts for public and general purposes are within the intent of the statute of Elizabeth, although they may be for the benefit of the rich as well as the poor.

It is not material that the particular public or general purpose is not expressed in the Statute of Elizabeth, all other legal, public or general purposes being within the equity of that statute. Thus a gift to maintain a preaching minister, a gift to build a sessions house for a county, a gift by parliament of a duty on coal imported into London, for the purpose of rebuilding St. Paul's Church, after the fire of London, have all been held charitable uses within the equity of the Statute of Elizabeth (per Sir John Leach, in *Attorney-General v. Heelis*, 2 S. & S. 76). So funds derived from the gift of the crown, or the gift of the legislature, or from private gift, for paving, lighting, cleansing and improving a town, are within the equity of the Statute of Elizabeth, and are to be administered as charitable funds (Ib. 77; and see *Howse v. Chapman*, 4 Ves. 542; *Attorney-General v. Heelis*, 2 S. & S. 67, 76, 77). So a gift to bring spring water for

the inhabitants of a town (*Jones v. Williams*, Amb. 651), to build a sessions house or house of correction (*Duke*, 109, 136), for the repair of highways (*Eltham Parish v. Warreyn*, Duke, 67; *Collison's Case*, Hob. 136), for a life-boat (*Johnston v. Swann*, 3 Madd. 457), for a botanical garden for the public benefit (*Tornley v. Bedwell*, 6 Ves. 194), to an institution as the British Museum established by the legislature, for the collection and preservation of objects of science and of art, and intended for public improvement (*The Trustees of the British Museum v. White*, 2 S. & S. 594), to charitable, beneficial and public works (*Mitford v. Reynolds*, 1 Ph. 185), "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain" (*Nightingale v. Goulbourn*, 2 Ph. 594, affirming the decision of Sir James Wigram, V. C., 5 Hare, 487; has been held to come within the meaning of the Statute of Elizabeth.

It seems that a gift towards payment of the national debt, would be considered a charitable gift (see *Thellusson v. Woodford*, 4 Ves. 235, 298, 310, 343; *Newland v. Attorney-General*, 3 Mer. 684; *Trustees of the British Museum v. White*, 2 S. & S. 594). But where an act of parliament passes for paving, lighting, cleansing and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised being in no sense derived from bounty or charity, in the most extensive sense of that word, are not charitable funds to be administered in a Court of Equity. 2 S. & S. 77, per Sir John Leach, V.C.

Superstitious Uses.

We must, however, carefully distinguish a charitable use, from what is termed a superstitious use. The latter has been defined "one which has for its object the propagation of the rites of a religion not tolerated by the law" (Boyle, 242). The statutes relative to superstitious uses are 23 Hen. 8, c. 10; 1 Ed. 6, c. 14; and 1 Geo. 1, c. 50, under which it has been decided that, gifts for the maintenance of Roman Catholic monasteries or other establishments at home or abroad (*De Garcin v. Lawson*, 4 Ves. 433, n.) for the purpose of maintaining Roman Catholic priests (*Gates v. Jones*, cited 2 Vern. 266), or to be applied to such purposes as a superior of a nunnery or her successor should judge most expedient (*Smart v. Prujean*, 6 Ves. 560), or for masses for prayers for a person's soul (*West v. Shuttleworth*, 2 M. & K. 684; *Attorney-General v. The Fishmongers' Company*, 2 Beav. 151; 5 My. & Cr. 11), for disseminating Roman Catholic doctrines, either by the education of the children of the poor (*Croft v. Evetts*, Mo. 784; *Attorney-General v. Power*, 1 Ball & B. 145; *Cary v. Abbot*, 7 Ves. 490), or for the purpose of maintaining a Roman Catholic priest (*The Attorney-General v. Todd*, 1 Keen, 803; and see *De Themmines v. De Bonneval*, 5 Russ. 288), have been held void. So has a gift for establishing a Jesuba, or assembly for instructing the people in the Jewish religion. *Da Costa v. De Pas*, Amb. 228; 1 Dick. 258; 2 Ves. 274, 276; 7 Ves. 76; 2 Swanst. 487; 2 J. & W. 306.

Bequests, however, for the purposes of Protestant Dissenters are valid; for although Lord North held that a bequest to the celebrated Mr. Baxter to be distributed among sixty pious ejected ministers, and to be laid out in his book entitled "A Call to the Unconverted," was void as superstitious, his decision was afterwards reversed (*Attorney-General v. Baxter*, 1 Vern. 248; 2 Vern. 105; 1 Eq. Ca. Abr. 96, pl. 9); and, consequently, bequests to Baptists, Unitarians and Irvingites have been held valid. See *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193, pl. 14; *Attorney-General v. Cock*, 2 Ves. 273; *West v. Shuttleworth*, 2 My. & K. 684; *Shrewsbury v. Hornbury*, 5 Hare, 406; *Attorney-General v. Lawes*, 8 Hare, 32.

In recent times, by 2 & 3 Will. 4, c. 115, which is retrospective (*Bradshaw v. Tasker*, 2 My. & K. 221), except as to suits already commenced (*Attorney-General v. Todd*, 1 Keen, 803), Roman Catholics have been put upon the same footing with respect to their schools, places for religious worship, education and charitable purposes, as Protestant Dissenters, subject, however, to the provisions of the Mortmain Act (9 Geo. 2, c. 36). This statute, coming after the 10 Geo. 4, c. 7, which relieved Roman Catholics from personal disabilities, has very materially altered the law upon this subject. Accordingly, it has since been decided, that a legacy to be applied to the use of a Roman Catholic college (*Walsh v. Gladstone*, 1 Ph. 29), and of Roman Catholic priests (*Attorney-General v. Gladstone*, 13 Sim. 7; 1 Ph. 290), is valid; but a bequest for masses for the souls of deceased persons is still void, as being superstitious (*Heath v. Chapman*, 2 Drew. 417: *sed vide Read v. Hodgins*, 7 Ir. Eq. Rep. 17). It has, however, been held, that a bequest enabling people of the Jewish religion to observe its rites is good (*Straus v. Goldsmid*, 8 Sim. 614), and now Jews, in respect to their schools, places of worship, education, and charitable purposes and property, are put upon the same footing as Protestant Dissenters. See 9 & 10 Vict. c. 59.

Where a gift made to charitable purposes is void as being superstitious, it becomes the duty of the crown, by sign manual, to appropriate it to valid charitable objects. Thus in *Cary v. Abbot*, 7 Ves. 490, where there was a bequest (which would now be valid) for the purpose of educating and bringing up poor children in the Roman Catholic faith, it was held by Sir William Grant, M. R., to be illegal. His Honor made the following observations:—"The consequence of the disposition being void, if authority was out of the question, would be an intestacy; that the gift being so void must be considered as no gift. But that is contradicted by authorities without number. According to them, whenever a testator is disposed to be charitable in his own way and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved by us; but we are to make him charitable in our way and upon our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only not within his intention, but wholly adverse to it, it is not for me to attempt to overturn the settled law and practice, according to which, charitable bequests, void

as to one object, may be appropriated to another." See also *Da Costa v. De Paz*, Amb. 228; 2 Swanst. 487; *De Garcin v. Lawson*, 4 Ves. 433.

If a bequest, being void as superstitious, has no charitable object, the crown cannot apply it for charitable purposes, but it will go to the residuary legatees, or in case of intestacy to the next of kin. Thus in *West v. Shuttleworth*, 2 M. & K. 684, where the testatrix left various sums of money to Roman Catholic chapels and priests, that she might "have the benefit of their prayers and masses," Sir C. Pepys, M. R., held the legacies void as superstitious, but that as they were not charitable,—“The intention being,” as he observed, “not to benefit the priests or to support the chapels, but to secure a supposed benefit to the testatrix herself,”—the next of kin were entitled to it and not the crown. See also *Heath v. Chapman*, 2 Drew. 417. These decisions, however, seem to be at variance with *Rex v. Portington*, 1 Salk. 162.

II. *What Gifts to Charities by Deed are valid as complying with the Requisitions of the Statute.*

With regard to a conveyance made as required by the act, it will be observed, in the first place, that they must be executed *twelve* calendar months before the death of the grantor, and must be enrolled within six calendar months after execution. It will be sufficient if the grantor has executed it, although the grantees may not have done so before enrolment (*Grieves v. Case*, 2 Cox, 301), and although the grantor retain possession of the deed afterwards. *Attorney-General v. Munby*, 1 Mer. 327.

If the deed be not duly enrolled, the grantor may himself take advantage of the want of compliance with the requisitions of the act and recover the property. *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 96; *Doe d. Preece v. Howells*, 2 B. & Ad. 744; *Attorney-General v. Munby*, 1 Mer. 327. See also *Doe v. Wrighte*, 2 B. & Ald. 710.

The Courts will not presume the enrolment of a deed even after a considerable period has elapsed since its execution. *Doe d. Howson v. Waterton*, 3 B. & Ald. 149; *Wright v. Smithies*, 10 East, 409.

But it seems that they are not bound upon public policy to take the objection of the absence of enrolment, which the party legally entitled to the property does not insist upon. Hence where trustees for a Dissenters' meetinghouse, in whom the legal estate was vested, admitted the trust, and did not raise the objection that the deed was void as not being enrolled under the statute, but submitted to act as the Court should direct, it was held by Sir James Wigram, V. C., that it was not competent to persons who had seceded from the society to raise the objection, and that the Court might appoint new trustees of the land. *Attorney-General v. Ward*, 6 Hare, 477.

A conveyance of land to trustees for charitable purposes duly enrolled will be valid, although it be made in pursuance of deeds relating to the same

land, and preliminary to those purposes, which have not been enrolled. *Attorney-General v. Munro*, 9 Jur. 461; 1 Holt's Eq. Rep. 99.

A mortgage to trustees of a charity does not, it seems, require enrolment. *Doe d. Graham v. Hawkins*, 6 Jur. 215.

Although a deed be properly enrolled, yet if the grantor die within twelve calendar months from its execution it will be void. *Price v. Hathaway*, 6 Madd. 304.

As to whether a conveyance, void from the want of enrolment, will revoke a prior will. See *Matthews v. Venables*, 2 Bing. 136; *S. C.* 9 Moore, 286.

Conveyances for valuable consideration upon trusts for the *education of the poor*, and not enrolled, are rendered valid if enrolled within twelve calendar months from the passing of 4 & 5 Vict. c. 38, s. 16 (21 June, 1841). And deeds for the purposes of the last-mentioned act are to be valid, although the donor die within twelve calendar months (7 & 8 Vict. c. 37, s. 3).

Grants also of land by *absolute owners* or *tenants in tail*, for *sites of schools* for instruction of masters and mistresses of elementary schools for poor persons, are also to be valid, although the grantor die within twelve calendar months (12 & 13 Vict. c. 49, s. 4). And see 15 & 16 Vict. c. 49, as to schools or colleges for the sons of yeomen, tradesmen and others, or for the theological training of candidates for holy orders.

The donor may, it seems, without rendering his gift invalid, reserve to himself the power of regulating the charity (*Grieves v. Case*, 2 Cox, 301); and a condition by which a vault and tomb is to be repaired and to be used for the grantor and his family, is not a reservation rendering a conveyance invalid within the meaning of the act, "the object of the act only being to prevent a reservation, under colour of a charitable use, of some substantial benefit to the donor himself." *Doe d. Thompson v. Pitcher*, 3 Mau. & Sel. 407, 410; 2 Marsh. 61; 6 Taunt. 359.

A grant by indenture executed more than twelve months before the grantor's death, and duly enrolled, of a house and premises held under a church lease to Trinity College, Cambridge, in trust for the rector of a parish, was held by Sir William Grant, M. R., to be valid under the statute, and not to be affected by the circumstance of the grantor being himself at the time of the grant, rector of the parish, and retaining the deed in his own possession. "The grant," said his Honor, "does not contain any reservation, the gift does take effect immediately in possession; there is no power of revocation, no trust, express or implied, from which the grantor, in his individual capacity, can derive any benefit; and although it is said that, on the face of the deed, the grantor is rector, and his gift is a gift for the benefit of the rector, yet it must, on the other hand, be acknowledged that this is a case for which the statute makes no provision, which is entirely out of its contemplation; that the gift itself is absolute and irrevocable; the benefit which the grantor enjoys under it only accidental; his enjoyment of the property no longer an enjoyment as owner, but as attached to the situation in which he happens to be placed. The moment he quits that situation, he

loses all enjoyment of the property, and that may be by circumstances over which he has no manner of control, by deprivation, or appointment to a higher benefice, perhaps at the very time when he is executing the instrument. The legislature had no intention or thought of precluding this sort of incidental advantage; and to construe the statute otherwise would be to prohibit a rector from bestowing any endowment on his own living." *Attorney-General v. Munby*, 1 Mer. 327.

Where there is a resulting trust to the grantor during his life, in consequence of no trust being declared for the charity during that period, the grant will be void under the statute as not being "to take effect in possession for the charitable use immediately from the making thereof." *Limbrey v. Gurr*, 6 Madd. 151.

Although all the requisitions of the statute are apparently complied with by the grantor, nevertheless if there be an agreement or understanding or design among the parties to the deed, that the payment of the income is not to be enforced during the life of the grantor, the deed will be void, as the whole transaction will be considered as a fraud upon the statute. The onus, however, of proving such an agreement or understanding or design rests on those who allege it as plaintiffs. *Way v. East*, 2 Drew. 44.

The second section of the Mortmain Act (in which the formalities required by the first are, it has been said, not required) was, it seems, suggested by the case of Queen Anne's Bounty, and other existing charities, where money was from time to time to be laid out in purchasing lands (*Attorney-General v. Day*, 1 Ves. 222; *Vaughan v. Farrer*, 2 Ves. 188; *Price v. Hathaway*, 6 Madd. 313); it was not intended to leave every person at liberty within twelve months before his death to give to charitable uses any land which within twelve months he had purchased for full and valuable consideration. See *Price v. Hathaway*, 6 Madd. 304.

In order to bring the case within the second section the consideration must be paid by the person for whose benefit the conveyance is made (*Doe d. Preece v. Howells*, 2 B. & Ad. 744). And the purchase must be bona fide and for full and valuable consideration, otherwise it will be void. *Doe d. Wellard v. Hawthorn*, 2 B. & Ald. 96; *Attorney-General v. Ward*, 6 Hare, 477.

However, by the 9 Geo. 4, c. 85, after reciting that it was only intended to prevent such purchases from being avoided by reason of the death of the grantor within twelve calendar months after the sealing and delivery of the deed or deeds relating thereto, it is enacted, that where lands have been purchased for full and valuable consideration for charitable uses, deeds of conveyance executed before the 25th July, 1828, are to be valid, although the formalities prescribed by 9 Geo. 2, c. 36, have not been observed.

III. *What Gifts by Will are invalid as being either Realty or savouring of Realty.*

All wills executed before the Mortmain Act by testators who died afterwards, whereby lands were devised to charitable purposes, are valid (*Ashburnham v. Bradshan*, 2 Atk. 36; *Attorney-General v. Andrews*, 1

Ves. 225). But all devises to charitable purposes made by wills dated after the passing of the act, whether of freehold, copyhold (*Arnold v. Chapman*, 1 Ves. 108) or leasehold (*Attorney-General v. Tomkins*, Amb. 216), are void.

• The act has, at any rate until recently, received a very strict construction, and any personalty savouring of realty has been held to come within the meaning of the first section of the act. So likewise a legacy of money to arise from the sale of land, as the legatee may elect to take the land (*Curtis v. Hutton*, 14 Ves. 537; *Page v. Leapingwell*, 18 Ves. 463; *Trustees of the British Museum v. White*, 2 S. & S. 595), is void; but it has been held that a bequest to charities, which included the proceeds of leaseholds to which a testatrix was entitled under the will of another person, and which were converted by the executors of such person after the death of the testatrix, was not within the provisions of the act (*Shadbolt v. Thornton*, 17 Sim. 49). This decision, however, seems contrary to a former one of Sir J. Leach, V. C., which was not cited in the case before Sir L. Shadwell, V. C., where the former learned Judge apparently lays down as the test of the validity of such gifts, not whether it was the duty of trustees under a former instrument to have converted the lands into money previous to the death of the person making the bequest to the charity, but what was then the actual state of things; and that, if at that time the conversion had not taken place, the bequest, as constituting an interest in lands, could not be given to a charity, *Attorney-General v. Harley*, 5 Madd. 321, where a testatrix, entitled to money to arise under a trust for the sale of real estate, bequeathed her residuary personal estate to a charity, it was held by Sir John Leach, V. C., that, as conversion had not taken place, the money to arise therefrom could not constitute part of the bequest to the charity.

Arrears of rent have been recently held by Sir W. P. Wood, V. C., not to come within the meaning of the act. *Edwards v. Hall*, 17 Jur. 593; 22 L. J., Ch., 1078.

A bequest to a charity of money to be laid out in the purchase of land is clearly void, even although the trustees have power to invest upon personal securities until a suitable purchase can be made (*Attorney-General v. Heartwell*, 2 Eden, 234; *Grieves v. Case*, 4 Bro. C. C. 67; 1 Ves. jun. 548; 2 Cox, 301; *Pritchard v. Arbouin*, 3 Russ. 458; *Mann v. Burlingham*, 1 Keen, 235; and see *English v. Orde*, Duke's Ch. Uses, by Bridg. 432); and a recommendation to trustees to purchase has been held to be mandatory, and therefore void (*Attorney-General v. Davies*, 9 Ves. 546; *Kirkband v. Hudson*, 7 Price, 212; *Pilkington v. Boughey*, 12 Sim. 114).

Where, however, trustees have an option to invest either in land or upon government or personal security, the bequest will be valid (*Soresby v. Holins*, Amb. cited 211; 9 Mod. 221; *Widmore v. Governors of Queen Anne's Bounty*, 1 Bro. C. C. 13, n.; *Attorney-General v. Parsons*, 8 Ves. 186; *Curtis v. Hutton*, 14 Ves. 537; *Edwards v. Hall*, 17 Jur. 593; 22

L. J. 1078); but where the direction to invest the money in a legal manner is only to take effect in case the trustees cannot conveniently purchase land, this will not be considered such an option as to render the gift good, and it will be invalidated by the primary intention to invest in land. *Attorney-General v. Hodgson*, 15 Sim. 146; sed vide *Grimmett v. Grimmett*, Amb. 210; *Attorney-General v. Goddard*, T. & R. 348.

A direction to lay out money in such mortgage securities as the trustees should approve, will not be considered as giving them an option to lay out the money in unobjectionable securities, such as on the mortgage of personal chattels or Irish or Scotch securities, and will therefore be void. *Baker v. Sutton*, 1 Keen, 224.

Where, however, the *income* of a sum has been bequeathed for providing a proper schoolhouse (*Johnson v. Swann*, 3 Madd. 457; *Crafton v. Frith*, 4 De G. & Sm. 237) or for and towards establishing a school (*Attorney-General v. Williams*, 2 Cox, 387; *Cawood v. Thompson*, 1 Sm. & Giff. 409), the bequest has been held valid, upon the ground that the purchase of lands for the purpose of the charity was not intended. Where, however, a *sum of money*, and not merely the income, was left for *establishing* a school at a certain place, provided a further sum could be raised in aid thereof if found necessary; Sir G. Turner, V. C., held the bequest invalid, as it appeared to be the intention that a site should be procured in the locality mentioned. *Attorney-General v. Hull*, 9 Hare, 647; *Re Clancy*, 16 Beav. 295; and see *Attorney-General v. Hodgson*, 15 Sim. 146.

In a recent case the rule, as applicable to these cases, has been laid down in a very stringent manner by Sir R. T. Kindersley, V. C., viz. that where, although it might be possible to apply a fund of pure personalty towards establishing the object of the trust without purchasing land, it would be a due execution of the trusts of a will to make such purchase, the case will come within the statute, and the gift consequently be void (*Longstaff v. Rennison*, 1 Drew. 28, 34; sed vide *Davenport v. Mortimer*, 3 Jur. 287).

Although a will may contain no directions to purchase land, yet if the nature and objects of the charitable operation are such that the purchase must be made, the bequest will be void (*Widmore v. Woodroffe*, Amb. 636; *Middleton v. Clitherow*, 3 Ves. 734). A bequest, however, to the incorporated society for promoting the enlargement, building and repairing of churches and chapels has been held good, inasmuch as the society has no power to purchase lands. *The Incorporated Society, &c. v. Barlow*, 3 De Gex, Mac. & Gord. 120.

Where there is a bequest of money to a charity, which is to arise partly from the sale of land and partly from pure personalty, it will be void only so far as the amount would have arisen from the realty. *Waite v. Webb*, 6 Madd. 71.

A bequest of money to be laid out in buildings to be dedicated to a charitable purpose is invalid (*Pelham v. Anderson*, 2 Eden, 296; 1 Bro. C. C. 444, n.; *Attorney-General v. Nash*, 3 Bro. C. C. 588; *Attorney-General*

v. *Whitchurch*, 3 Ves. 144; *Chapman v. Brown*, 6 Ves. 404; *Attorney-General v. Parsons*, 8 Ves. 186; *Attorney-General v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Russ. 458; *Attorney-General v. Hodgson*, 15 Sim. 146; *Smith v. Oliver*, 11 Beav. 481; overruling *Vaughan v. Farrer*, 2 Ves. 182; *Attorney-General v. Bowles*, Ib. 547; 3 Atk. 806), unless upon lands (*Glubb v. Attorney-General*, Amb. 373; *Brodie v. Duke of Chandos*, 1 Bro. C. C. 444, n.; *Attorney-General v. Bishop of Oxford*, Ib.; *Attorney-General v. Parsons*, 8 Ves. 186; *Attorney-General v. Munby*, 1 Mer. 327), or in repairs or improvements on lands (*Harris v. Barnes*, Amb. 651; *Attorney-General v. Bishop of Chester*, 1 Bro. C. C. 444) already in mortmain (see also *Shaw v. Pickthall*, Dan. 92; *Ingleby v. Dobson*, 4 Russ. 342); and it will not be sufficient for this purpose that the charity has lands already in mortmain, unless it appears that the testator did not intend that other lands should be bought. *Gibblett v. Hobson*, 5 Sim. 651; 3 My. & K. 517.

The rule deducible from the authorities upon this subject, which are by no means all consistent one with another, is well stated by Sir J. Romilly, M. R., in a recent case, viz.:—"That a bequest is void which tends directly to bring fresh lands into mortmain; and also that a bequest of money to be expended in the erection or repair of buildings is void, unless the testator expressly states in his will his intention that the money so bequeathed is to be expended on some land then already in mortmain." See *Trye v. The Corporation of Gloucester*, 14 Beav. 173, 196, in which case where money had been left by will for the erection of buildings for charitable purposes, in case some person should within ten years provide land whereon to build, although there was also an express prohibition against purchasing land, his Honor held that the bequest was invalid. See also *Mather v. Scott*, 2 Keen, 172, and the dicta of Lord Eldon, 9 Ves. 544. Sed vide *Dixon v. Butler*, 3 Y. & C. Exch. Cas. 677; *Carwood v. Thompson*, 1 Sm. & Giff. 409, and the dicta of Lords Eldon and Brougham, 8 Ves. 191; 3 My. & K. 530. If, however, it appears to be the testator's intention that the charity is to have the money, although the land be not obtained from other sources, the bequest will be good. *Henshaw v. Atkinson*, 3 Madd. 306; sed vide *Attorney-General v. Tyndall*, 2 Eden, 207.

A bequest to a person on condition that he will provide land for a charitable purpose is clearly void. *Attorney-General v. Davies*, 9 Ves. 535.

A bequest of pure personalty is of course good under the act, but it may be so connected with a devise of real estate as to be void. As where a testatrix devised certain houses for the benefit of the poor of a parish, and gave the dividends of a sum of money for the houses for ever; it was held, that as the gift of the houses was void, and that it would be contrary to the testatrix's intention that the fund should be applied otherwise than to the persons inhabiting the houses, the gift of the 800*l.* was void also, *Attorney-General v. Goulding*, 2 Bro. C. C. 428; and see *Attorney-General v. Whitchurch*, 3 Ves. 141; *Price v. Hathaway*, 6 Madd. 304. If an ultimate

bequest of a residue of personalty to a charity, not void in itself, is only to take effect after the employment of an indefinite sum for an object within the Mortmain Act, as the building of a chapel, the amount of which the Court cannot ascertain, the bequest of the residue will be void (*Chapman v. Brown*, 6 Ves. 404; *Attorney-General v. Parsons*, 8 Ves. 186; *Attorney-General v. Davies*, 9 Ves. 535; *Pritchard v. Arbouin*, 3 Russ. 458; *Attorney-General v. Hinxman*, 2 J. & W. 270); but if the legal can be separated from the illegal portion of the bequest, it will be supported. *Chapman v. Brown*, 6 Ves. 410; *Blandford v. Thackerell*, 2 Ves. jun. 238; *Waite v. Webb*, 6 Madd. 71.

Again, it was decided in the principal case that money to be laid out in exonerating charity lands in mortgage is void. And this will be the case even when the incumbrance is merely equitable (*Waterhouse v. Holmes*, 2 Sim. 162); so bequests of money secured on turnpike tolls (*Knapp v. Williams*, 4 Ves. 430, n.), railway undertakings (*Ashton v. Lord Langdale*, 4 De G. & Sm. 402), and upon the poor and county rates (*Finch v. Squire*, 10 Ves. 41; and see *Thornton v. Kempson*, Kay, 592), or upon mortgage (*Attorney-General v. Caldwell*, Amb. 635; *Attorney-General v. Meyrich*, 2 Ves. 44; *Attorney-General v. Earl of Winchelsea*, 3 Bro. C. C. 373; *White v. Evans*, 4 Ves. 21; *Currie v. Pye*, 17 Ves. 462), or charged on lands (*Arnold v. Chapman*, 1 Ves. 108; *Attorney-General v. Harley*, 5 Madd. 321), or a vendor's lien (*Harrison v. Harrison*, 1 Russ. & My. 71), have been held void.

A bequest of shares in public companies, who hold lands for the purposes of or as incidental to their undertakings, is not now considered as savouring of realty, and will therefore be valid. Thus bequests to charities, of shares in the London Gaslight and Coke Company (*Thompson v. Thompson*, 1 Coll. 381; and see *Sparling v. Parker*, 9 Beav. 450), in the London and East and West India Dock Companies (*Hilton v. Giraud*, 1 De G. & Sm. 183), Dock and Canal shares, and bonds secured by an assignment of the rates (*Walker v. Milne*, 11 Beav. 507; *In the matter of Langham's Will*, 1 Eq. Rep. 118) in Joint-Stock Banks (the assets of which were by deed to be deemed personal estate, and which consisted of freehold, copyhold and leasehold hereditaments), railway, canal, waterworks and banking companies, of scrip shares in a projected company (*Ashton v. Lord Langdale*, 4 De G. & Sm. 402; *Myers v. Perigal*, 2 De Gex, Mac. & Gord. 599), and of policies of assurances, though the assets out of which they were made payable consisted partly of real estate (*March v. The Attorney-General*, 5 Beav. 433), have been held good.

Assets will not be marshalled by a Court of Equity in favour of a charity. Thus if a testator give his real estate and personal estate, consisting of personalty savouring of realty, as leaseholds and mortgage securities, and also pure personalty, to trustees, upon trust to sell, and pay his debts and legacies, and bequeath the residue to a charity, equity will not marshal the assets by throwing the debts and ordinary legacies upon the proceeds of the real

estate, and the personalty savouring of realty, in order to leave the pure personalty for the charity (*Mogg v. Hodges*, 2 Ves. 52; *Fourdryn v. Gomdey*, 3 My. & K. 397; *Johnson v. Woods*, 2 Beav. 409). The rule of the Court in all such cases is to appropriate the fund, as if no legal objection existed as to applying any part of it to the charity legacies, then holding so much of the charity legacies to fail, as would in that way be payable out of the prohibited fund. Per Lord Cottenham in *Williams v. Kershan*, 1 Keen, 275, n.

But although a Court of Equity will not marshal assets for charitable legacies, a testator may in effect himself marshal or arrange his assets, by directing his charitable legacies to be paid exclusively out of his pure personalty, and the Court will, as it is not illegal, give effect to his intention. Thus in *Robinson v. Geldard*, 3 Mac. & G. 735, a testator bequeathed 10,000*l.* to a charity, to be raised and paid out of such part of his ready money, goods and personal effects as he could by law charge with the same, and five other legacies to individuals. It was held by Lord Truro, C., that the general legacies ought to be paid out of the personalty savouring of realty, so as to leave the pure personalty for the payment of the legacy to the charity. See also *Sturge v. Dimsdale*, 6 Beav. 462, in which case a testatrix created a mixed fund of realty and personalty for payment of her debts and legacies; but she directed the charity legacies to be paid out of pure personalty. She afterwards directed her trustees to set apart a sum of stock sufficient to provide for a number of annuities, and as the annuitants died, the stock let loose was to be applied in payment of the charity legacies. It was held by Lord Langdale, M. R., that although the direction alone might not of itself be sufficient to prevent the charity legacies from being payable out of the realty, in the proportion of the realty to the personalty, nevertheless the second part created a demonstrative fund of pure personalty, out of which the charity legacies were to be paid. See, however, *The Philanthropic Society v. Kemp*, 4 Beav. 581. And it seems that, where a testator has directed his charity legacies to be paid out of his pure personalty, the charity legatees will have a right to stand in the place of specialty creditors who may have exhausted the pure personalty, inasmuch as it is not the Court, but the testator, who marshals the assets. *Attorney-General v. Lord Mountmorris*, 1 Dick. 379.

Secret or honorary trusts will not be allowed in evasion of the statute; for if there be a devise to persons and their heirs, and there is a secret understanding between the devisees and the testator, that they will hold the land upon trust for a charity, the devise will be void, as being made in fraud of the statute, and the devisees will be compelled by the Court of Chancery to answer as to the secret trust, and will not be allowed to plead the Statute of Frauds (*Boson v. Statham*, 1 Eden, 508; *Edwards v. Pike*, *Ib.* 267; *Muckleston v. Brown*, 6 Ves. 52; *Strickland v. Aldridge*, 9 Ves. 516; *Pilkington v. Boughey*, 12 Sim. 114; *Russell v. Jackson*, 9 Hare, 387; 10 Hare, 204). If a secret trust is neither admitted nor proved, the mere fact that a testator has left a memorandum desiring the land devised to be

applied to charitable purposes, the devisees will take a beneficial interest. *Addington v. Cann*, 3 Atk. 141; *S. C. Barn. Ch. Rep.* 130; *Paine v. Hall*, 18 Ves. 475; see also *Lomax v. Ripley*, 3 Eq. Rep. 301; 1 Jur. N. S. 272.

If a devise or bequest to a charity fail, as being against the provisions of the Mortmain Act, there will (if there be no residuary devise or bequest), as a general rule, be a resulting trust for those persons who would have taken the property in the event of the testator dying intestate. Thus freeholds will go to the heir-at-law, leaseholds or other personalty savouring of realty will go to personal representatives. *Middleton v. Cater*, 4 Bro. C. C. 409; *Chapman v. Brown*, 6 Ves. 404. When a sum given to charitable uses is *excepted* out of a devise, it will in general result for the benefit of the heir (*Arnold v. Chapman*, 1 Ves. 108; *Gravenor v. Hallum*, Amb. 643); but where lands are given *subject* to a charge, and the charge is void under the Mortmain Act, the sum so charged sinks for the benefit of the devisee (*Wright v. Row*, 1 Bro. C. C. 61; *Jackson v. Hurlock*, 2 Eden, 263: see the remarks of Lord Brougham, *Henchman v. The Attorney-General*, 3 My. & K. 493). Where leaseholds were devised on condition to assign part to a charity, the legatee was held entitled to the whole, discharged of the condition. *Poor v. Mial*, 6 Madd. 32; and see *Henchman v. The Attorney-General*, 3 My. & K. 485.

So where land is directed to be sold, and the whole, or part, is given to a charity, the whole or part which thus fails on account of the illegality of the gift will result to the heir-at-law (*Attorney-General v. Lord Weymouth*, Amb. 20; *Hopkinson v. Ellis*, 10 Beav. 169). Upon the same principle, where money is directed to be laid out in land for the benefit of a charity, there will be a resulting trust for the next of kin. *Cogan v. Stephens*, cited 1 Beav. 482.

The Mortmain Act is not applicable to *Ireland* (*Campbell v. Lord Radnor*, 1 Bro. C. C. 272; *Attorney-General v. Power*, 1 Ball & B. 145), nor to *India* (*The Mayor of Lyons v. The East India Company*, 1 Moore, P. C. Cas. 175; *Mitford v. Reynolds*, 1 Ph. 185, 192); nor in general to our colonies—as to New South Wales (*Whicker v. Hume*, 1 De Gex, Mac. & Gord. 506), or the West Indies (*Attorney-General v. Stewart*, 2 Mer. 143). See also *Curtis v. Hutton*, 14 Ves. 537; *Attorney-General v. Mill*, 3 Russ. 328; 5 Bligh, N. C. 593; 2 Dow. & C. 393.

Exceptions from the Operation of the Act.

The act itself, it will be observed, contains express exceptions in favour of the two universities, that is to say, Oxford and Cambridge (Oxford and Cambridge being at the time of the passing of the act the only two), and their colleges, the scholars on the foundation of the colleges of Eton, Winchester and Westminster, and with respect to real and personal estate in Scotland. But with regard to the universities, the legislature meant only to except such devises as were really and bonâ fide for the benefit of colleges,

not those in which the legal interest only passes to the college in trust for other charitable uses, for then the Statute of Mortmain might be defeated every day. Per Lord Northington in *Attorney-General v. Tancred*, 1 Eden, 15; *S. C.* Amb. 351; and see *Attorney-General v. Munby*, 1 Mer. 327; *Attorney-General v. Whorwood*, 1 Ves. 534. Lord Northington seemed also to be of opinion, in *Attorney-General v. Tancred*, that the exception extended only to colleges established in the universities at the time of the statute; but Lord Rosslyn expressed his doubts of the distinction (*Attorney-General v. Bowyer*, 3 Ves. 728, note (f)). With regard to Scotland, it has been decided, that a legacy of money to be laid out in the purchase of heritable securities (*Oliphant v. Hendrie*, 1 Bro. C. C. 571), or in land there (*Mackintosh v. Townsend*, 16 Ves. 330), comes within the exception.

Since the passing of 9 Geo. 2, c. 36, many public charities and institutions have been excepted, either wholly or partially, from its operation, and consequently devises of land to the extent allowed by the acts creating those exceptions may be made to them. Amongst these may be mentioned the Foundling (17 Geo. 2, c. 29), the British Museum (26 Geo. 2, c. 22, s. 14, and 5 Geo. 4, c. 39), the Marine Society (12 Geo. 3, c. 67), the Bath Infirmary (19 Geo. 3, c. 23), Queen Anne's Bounty (43 Geo. 3, c. 107), the Royal Naval Asylum (51 Geo. 3, c. 105), Commissioners of Greenwich Hospital (10 Geo. 4, c. 25, s. 37), St. George's Hospital (4 Will. 4, c. 38; local and personal acts), the Seaman's Hospital Society (3 & 4 Will. 4, c. 9, ss. 1, 2), Museums of Art and Science (8 & 9 Vict. c. 43). *Harrison v. Mayor of Southampton*, 23 L. J., Ch., 919.

As to the investment of funds belonging to a charity in land, for the purpose of enlarging the charity, see *Attorney-General v. Wilson*, 2 Keen, 680; *Mather v. Scott*, 2 Keen, 172; *The Attorney-General v. The Wardens, &c., of Highgate School*, 14 L. J., N. S., Ch., 425.

It should be remembered, that, by a recent statute, donations, devises or bequests, whereby any estate in lands, tenements or hereditaments in Ireland is conveyed or created for pious or charitable uses, must be executed three calendar months before the death of the donor (7 & 8 Vict. c. 97, s. 16); and a deed must also be registered within the same period. *Ib.*

IV. *The Construction adopted by Courts of Equity, with regard to valid Gifts to Charities, and herein of the Doctrine of Cy près.*

When a bequest is made to a charity of pure personalty, the Courts have adopted rules of construction, which render such bequests valid, although they would clearly have been invalid, if construed according to the rules adopted with respect to legacies to individuals.

The general principle upon which the Court acts is well laid down by Lord Eldon in the Leading case of *Moggridge v. Thackwell*, 7 Ves. 69; viz. "that if the testator has manifested a *general intention* to give to charity, the *failure of the particular mode*, in which the charity is to be effectuated

shall not destroy the charity ; but if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished."

His Lordship, in the same case, also notices an important distinction, with regard to the administration of the charitable funds, viz. that when the execution of the charitable purpose is committed to trustees with general or some objects pointed out, there the Court of Chancery will take the administration of the trust, and carry it into effect by means of a *Scheme* ; but where the property is not vested in trustees, and the gift is to charity generally, not to be ascertained by the act of individuals referred to, the charity is to be disposed of, not by a scheme, but by the *sign manual of the King*, who is the disposer of such charities in his character of *parens patriæ*. *Moggridge v. Thackwell*, 7 Ves. 75 ; *Attorney-General v. Syderfen*, 1 Vern. 224 ; and *Attorney-General v. Matthews*, 2 Lev. 167 ; S. C. nom. *Jones v. Peacock*, Ca. t. Finch, 245 ; *Paice v. Archbishop of Canterbury*, 14 Ves. 372 ; *Hayter v. Trego*, 5 Russ. 113 ; *Attorney-General v. Gladstone*, 13 Sim. 7 ; *Attorney-General v. Fletcher*, 5 L. J., N. S., Ch., 75 ; *Denyer v. Druce*, Taml. 32.

Where a person bequeaths a legacy to such charitable purposes as he shall afterwards direct, and dies without leaving any direction, the legacy will nevertheless be effectuated by the Court by a scheme. *Mills v. Farmer*, 1 Mer. 55 ; see also *Ommaney v. Butcher*, T. & R. 270 ; *Mayor of Gloucester v. Wood*, 3 Hare, 131, 144 ; and see *Wheeler v. Sheer*, Mos. 288.

Where a gift is made to a class generally, and no objects of it are selected ; as, for instance, where there is a bequest " to the poor inhabitants " of a particular place (*Attorney-General v. Clarke*, Amb. 422) ; or the poor generally (*Attorney-General v. Matthews*, 2 Lev. 167 ; S. C. nom. *Frier v. Peacock*, Rep. t. Finch, 245 ; *Attorney-General v. Rance*, cited Amb. 422), the Court will support the legacy and make the selection. So likewise a bequest of stock, for putting out " poor relations " apprentices, confined by a codicil to two families, was held good as a charity (*White v. White*, 7 Ves. 423 ; and see *Attorney-General v. Price*, 17 Ves. 371). So a bequest " to the widows and children of seamen belonging to the town of Liverpool," was held a good charitable bequest, although it urged that it was void for uncertainty. *Powell v. Attorney-General*, 3 Mer. 48 ; and see *Attorney-General v. Wilkinson*, 1 Beav. 370.

Even if there be a bequest to trustees for charitable purposes generally, or as they shall in their discretion think fit, no objects being named, it will be carried into effect (*Baylis v. Attorney-General*, 2 Atk. 239 ; and *Attorney-General v. Herrick*, Amb. 712 ; see *Paice v. Archbishop of Canterbury*, 14 Ves. 364) ; so where there are objects named (*Attorney-General v. Gleg*, 1 Atk. 356 ; *Attorney-General v. Baxter*, 1 Vern. 247 ; *Cook v. Duckenfield*, 2 Atk. 562 ; *Attorney-General v. Freeman*, 1 Dan.

Exch. Rep. 117); and even if the trustees die during the life of the testator (*Moggridge v. Thackwell*, 7 Ves. 36; *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193, pl. 14; *Walsh v. Gladstone*, 1 Ph. 290), or if the testator erases their names from his will without substituting others. *White v. White*, 1 Bro. C. C. 12.

Where there is a bequest to a charitable corporation, the Court will direct payment to be made without a scheme (see *Society for the Propagation of the Gospel in Foreign Parts v. Attorney-General*, 3 Russ. 142), but not to individuals where permanent trusts are intended by the testator. *Well-beloved v. Jones*, 1 S. & S. 43. In *Walsh v. Gladstone*, 1 Ph. 290, a legacy was given to the Rev. Thomas Robinson (who died in the lifetime of the testator), to be applied to the use of a Roman Catholic college. The Court being satisfied of the respectability and permanent character of the institution, ordered the legacy to be paid to the president of the college, who was the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the Attorney-General asked one. Sed vide *Wellbeloved v. Jones*, 1 S. & S. 43.

Nor will the Court settle a scheme for a foreign charity. *Collyer v. Burnett*, Tam. 79; *Mitford v. Reynolds*, 1 Phil. 194; *Mayor of Lyons v. East India Company*, 1 Moo. P. C. 176, 293.

Although a charitable bequest may be made to an object not in existence, and is therefore incapable of taking effect immediately, or for a considerable time after the testator's death; upon the object appearing, the funds will after a great lapse of time be applied for the purposes intended by the testator. *Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 444; *Attorney-General v. Oglander*, 3 Bro. C. C. 166.

We have before seen that gifts to charities do not fall within the rule against perpetuities (ante, p. 384), which is applicable to all gifts to individuals. The Courts likewise, in considering whether a gift is created in perpetuity for a charity, do not adhere to forms, but always look at the intention, and will carry that into effect, though it would be otherwise with regard to ordinary gifts. Thus although a legal fee cannot by deed be given to individuals without the word "heirs," and could not (previous to the late Wills Act, 1 Vict. c. 26) be given in a will without the use of the same word "heirs," or some equivalent expression, those or similar words are not indispensable in creating perpetual gifts to charity (*Attorney-General v. Corporation of Berwick-upon-Tweed*, Tam. 239, 246). A gift to a man teaching at a particular school of 5l. yearly, for teaching three boys, has been held not to be a gift to a particular schoolmaster, but to the school itself for teaching three boys in succession (*Cheeseman v. Partridge*, 1 Atk. 436). So likewise a gift to the parish church of St. Andrew, Holbourn, was construed to be a gift to the parson and parishioners of that parish and their successors for ever. *Ib.* 437, and see *Attorney-General v. Cock*, 2 Ves. 273.

Defects in assurances of charities have for a long period been aided; for instance, a tenant in tail by appointing or conveying lands to a charity with-

out a recovery has been held to bind his issue and the remainderman or reversioner in fee (*Tay v. Slaughter*, Prec. Ch. 16; *Attorney-General v. Burdett*, 2 Vern. 755); and (before the Mortmain Act), even by a devise to a charity (*Attorney-General v. Rye*, 2 Vern. 453; *Jennor v. Harper*, Gilb. Eq. Rep. 44). So likewise (previous to the Mortmain Act) the Court of Chancery would supply the surrender of copyholds to the uses of a will in favour of a charity (*Attorney-General v. Andrews*, 1 Ves. 225; *Attorney-General v. Downing*, Amb. 571); and it has been held at the present day, that by analogy the defective execution of a power in favour of a charity ought to be aided in equity. Thus where a testatrix having a general power of appointment exercised it without pursuing the formalities required by the power, it was nevertheless held to be a good appointment in favour of a charity. *Sayer v. Sayer*, 7 Hare, 377; *Innes v. Sayer*, 3 Mac. & G. 606.

The doctrine of cy près, or approximation to the intention of the donor, is applicable to charities; for when a particular charity is named by the testator, which cannot from some cause or other take effect, and there is a general intention in favour of charity, the Court of Chancery will carry out the general charitable intention, by the adoption of some other charitable objects not inconsistent with such intention.

Where the gift denotes a charitable intention, but the object, to which the exercise of it is applied, is against the policy of the law, as in the case of a gift to superstitious uses, the Court will lay hold of the charitable intention, and execute it for the purpose of establishing some charity agreeable to the law, in the room of that contrary to it, *Moggridge v. Thackwell*, 7 Ves. 75; and see *Attorney-General v. Baxter*, 1 Vern. 248; reversed afterwards upon other grounds, nom. *Attorney-General v. Hughes*, 2 Vern. 105; *Da Costa v. De Pas*, Amb. 228; *S. C.* 1 Dick. 258; 2 Swanst. 487; and *Gates v. Jones*, cited in *Attorney-General v. Guise*, 2 Vern. 266.

Amongst the numerous examples showing how the Court will give effect to the general intention in favour of charity, when the particular mode pointed out fails, we may mention a few. Thus where there was a bequest to the governors of a society, instituted "for the increase and encouragement of good servants," and no such institution could be found, it was nevertheless held by Lord Langdale, M. R., that there was a good gift to a charity, observing, that the only reason for naming the governors was, that they might be the instruments for the application of the fund, that it was a gift for a charitable and public purpose, and that he could not persuade himself that the testator had a special intention in favour of that particular society only. *Loscombe v. Wintringham*, 13 Beav. 87. So where a testator directed funds to be provided for certain charity-schools by accumulating his property, but fixed no time for the continuance of the accumulation, which must necessarily have exceeded the legal period, it was held by Sir L. Shadwell, V. C., that although, in consequence of the direction to accumulate being void, the particular mode in which the testator meant the benefits to be doled out to

the objects of his bounty could not take effect, yet, as there was a devotion by the testator of his personal estate to charitable purposes, the next of kin had no claim, and that the charitable intention ought to be carried into effect by means of a scheme, *Martin v. Margham*, 14 Sim. 230. So where a testator bequeathed 1,000*l.* to "the Jews' poor, Mile End," and there were two charitable institutions for poor Jews at Mile End, and it did not appear which of the charities was meant, it was held by Lord Langdale, M. R., that the fund ought to be applied *cy près*; and the Court divided the fund between the two charitable institutions. *Bennett v. Hayter*, 2 Beav. 81. See also *Mayor, &c. of Gloucester v. Wood*, 3 Hare, 131, 144; and see the note 13 Beav. 89.

In *The Attorney-General v. The Bishop of Llandaff*, cited 2 My. & K. 586, Lord Craven by his will gave part of his property to endow scholarships at the two Universities, and the residue to redeem British captives. Upon a reference to the Master it was found that there were none to redeem, and a scheme being approved was sanctioned by the Court, for using all this fund, except a moderate portion set apart in case captives should be made, and applying the residue to increase the number and income of the scholars. And see a case very similar to this, *Attorney-General v. Ironmongers' Company*, 2 My. & K. 576; *S. C.* 2 Beav. 313; *Cr. & Ph.* 208. So also in the case of *Attorney-General v. Boulton*, 2 Ves. jun. 380, where a trust was created by Sir Francis Nethersole for the benefit of the vicar for the time being of a certain parish (the presentation to which was in the gift of the Chancellor), provided he should be presented with approbation of himself during his lifetime, and after his decease by the procurement of the trustees or the greater part of them, and in no case without such procurement. The trustees having neglected to recommend any person to the Chancellor, a vicar was appointed without their procurement. It was held by Lord Alvanley, M. R., that the vicar was nevertheless entitled to the benefit of the trust. "Sir Francis Nethersole," said his Lordship, "had two intentions, the first was a *general* charitable object, and very proper,—an anxious desire to provide what he specified in his declaration,—what he thought a competent maintenance for the vicar. There was also another object. The question is, whether that was equally important, and was annexed to the first so that they must stand and fall together. It was to secure to himself or his trustees the recommendation, or approbation at least, of the person nominated. If both these purposes can be effected they ought: but did he mean the first object to fail, if, from the obstinacy or neglect of his trustees, the second could not take effect. That was not argued. Then there may be a case in which this maintenance may be applied to the vicar, though he has not received that approbation, if it has been prevented by the neglect of the trustees. Have they been guilty of neglect? Have the circumstances been such as to induce the Court to say, the general object shall prevail though this condition cannot be complied with? They have not done all they ought." And after citing *Attorney-*

General v. Rigby, 3 P. Wms. 145, and *Attorney-General v. Leigh*, Ib., in notis, his Lordship adds, "Hence it appears, the Court will not permit the general intention to fail for want of circumstances annexed; which by the fault or neglect of the parties cannot take effect. Therefore this vicar is entitled to the benefits entitled for the vicars of Polesworth; not upon the idea that if the trustees had recommended in proper time, and that recommendation had not succeeded, that then he would have been entitled; but upon this, that the general object was, that there should be a good minister: and there was a secondary intention, that he should come in with the approbation of the trustees. The question is, whether under these circumstances, I do not answer his intention better by giving this benefit to the vicar, though, from the unfortunate neglect of the trustees, he came in without their recommendation. I am of opinion they ought to have taken more pains than they did; and their neglect shall not defeat the general intention." Upon appeal to the Lord Chancellor, he conceived that he had an interest in it, and referred it to Lord Chief Justice Eyre and Lord Chief Baron Macdonald, and upon their certificate the decree was affirmed. 3 Ves. 220; see also *Attorney-General v. The Mayor, &c. of London*, 3 Bro. C. C. 171; S. C. 1 Ves. jun. 243; *Attorney-General v. Glasgow College*, 2 Coll. 665, reversed D. P. 1 H. L. Cas. 801; *Martin v. Margham*, 14 Sim. 230; *Loscombe v. Wintringham*, 13 Beav. 87; *Coldwell v. Holme*, 2 Sm. & Giff. 31; *Attorney-General v. Lames*, 8 Hare, 32.

In the case of *Attorney-General v. Glyn*, 12 Sim. 84, a school was founded for the education of the poor within a certain district. The district was converted into a dock, under a local act of parliament, so that the objects of the charity failed. The Court directed the funds of the charity to be applied *cy près* by means of a scheme.

Sometimes charities for the benefit of the poor have been partly applied for the education of their children (see *Hereford v. Adams*, 7 Ves. 324; *Wilkinson v. Malin*, 2 Cro. & Jer. 636, 655; *Attorney-General v. Bovill*, 1 Ph. 762); but where the primary object of the charity is relief of the poor by the distribution of the income amongst them, that must be satisfied before any portion thereof can be applied for the purposes of education. *In re Lambeth Charities*, 22 L. J., N. S., Ch., 959; *Re Stane's Will*, 21 L. T. Rep. 261.

Where, however, a testator's act shows an intention of giving to some particular institution, and such intention cannot be carried out, and there is no intention in favour of charity generally, the bequest will fail in the same mode as if it were made to an individual not in existence. Thus in *Attorney-General v. Bishop of Oxford*, cited ante, p. 420, the testator, after giving to his executors 100*l.* each for their trouble, gave and bequeathed the rest and residue of his personal estate upon trust, "to build a church at Wheatley, where the chapel now is, in such manner as I shall hereafter direct, or, for want of such direction, as my executors shall think fit." The Bishop of Oxford, who was patron and parson of Cuddesden, in which

Wheatley was, opposed the design of building a church; and it was proposed by the defendants that the salary of the chaplain should be increased. The next of kin insisted that a new church must be built, and that the surplus belonged to them. By the first decree it was referred to the master to take the accounts; and it was directed, that the defendants, the Bishop of Oxford, &c., do signify whether they are willing that the residue of the testator's personal estate shall be laid out in building a church at Wheatley, where the chapel now stands, with liberty to lay a plan before the Master, how the said residue may be most beneficially applied according to the will of the testator. Before the cause came on again, many transactions had taken place. The next of kin, and the persons entitled to the benefit under the will, the parishioners, acting by the bishop and their wardens, came to an agreement, that 3,000*l.*, part of the residue of the testator's personal estate, should be applied for the purpose of building a new church, and forming a fund for keeping it in repair, and that 1,000*l.*, other part thereof, should be applied towards augmenting the minister's salary; and that 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. Sir R. P. Arden, M. R., in remarking upon this case, observes, "This decree is completely decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree, unless they thought the residue was not applicable to any other charitable purpose. I will not say it could not have been applied for repairing or sustaining the chapel; and I doubt whether Lord Kenyon said so; but beyond that purpose, or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable to any other general charitable purpose, or any other purpose for the benefit of the parish, except of the nature pointed out, that decree could not have been justified." See also *Attorney-General v. Goulding*, 2 Bro. C. C. 428; *Cherry v. Mott*, 1 My. & Cr. 123; *Smith v. Oliver*, 11 Beav. 481; *Clark v. Taylor*, 1 Drew. 642.

And although the Court will go so far in carrying out a testator's intention with regard to charities, it has been decided that where the amount of a legacy to charitable purposes is uncertain it will be void (see *Chapman v. Brown*, 6 Ves. 404; *Attorney-General v. Davies*, 9 Ves. 535; *Attorney-General v. Hinxman*, 2 J. & W. 270; and see *Ewen v. Bannerman*, 2 Dow. & Clarke, 74); but the gift of a residue will not be invalidated on the ground of uncertainty, where it is to arise after the erection of buildings of a particular kind, and in a particular place (the direction to make which is against the provisions of the statute), if the sum for which the buildings could be completed can be ascertained, for upon its being deducted from the residue, the amount applicable to the charitable object would become certain. *Mitford v. Reynolds*, 1 Ph. 185, 197.

So likewise where the purpose of testator is uncertain or indefinite, and is not charitable in the legal sense of the word, the legacy cannot be supported. Thus in *Morice v. The Bishop of Durham*, 9 Ves. 399, the

testatrix bequeathed the residue of her personal estate to the Bishop of Durham, his executors, &c., upon trust, after paying her debts and legacies, to dispose of the ultimate residue *to such objects of benevolence and liberality as the Bishop of Durham should most approve of*, and she appointed him her sole executor. Sir W. Grant, M. R., fully admitting the doctrine that if a *charitable* purpose is expressed, however generally, it will not fail on account of the uncertainty of the objects, held, nevertheless, that the gift failed. "Is this," said his Honor, "a trust for *charity*? Do purposes of *liberality* and *benevolence* mean the same objects as charity? That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted sense, relief of the poor. In neither of these senses is it employed in this Court. Here its signification is derived chiefly from the Statute of Elizabeth (43 Eliz. c. 4). Those purposes are considered charitable which the statute enumerates, or which by analogies are deemed within its spirit and intendment, and to some such purpose every bequest to charity generally shall be applied. But, it is clear, liberality and benevolence can find numberless objects not included in that statute in the largest construction of it. The use of the word "charitable" seems to have been purposely avoided in this will, in order to leave the bishop the most unrestrained discretion. Supposing the uncertainty of the trust no objection to its validity, could it be contended to be an abuse of the trust to employ the fund upon objects which all mankind would allow to be objects of *liberality* and *benevolence*; though not to be said, in the language of this Court, to be objects also of *charity*? By what rule of construction could it be said, all objects of liberality and benevolence are excluded which do not fall within the statute of Elizabeth? The question is, *not whether he may not apply it upon purposes strictly charitable, but whether he is bound so to apply it*. I am not aware of any case in which the bequest has been held charitable, where the testator has not either used that word to denote his general purpose, or specified some particular purpose which this Court has determined to be charitable in its nature. All the cases upon that subject are to be found in the report of *Moggridge v. Thackwell*. *Browne v. Yeale* (7 Ves. 50, n.) I should have thought a much more doubtful case. There was ground for contending that the particular purpose specified was charitable in itself, according to the decisions of this Court; and it was described by the testator as a charitable design. But here there is no specific purpose pointed out, to which the residue is to be applied; the words "charity" and "charitable" do not occur; the words used are not synonymous: the trusts may be completely executed without bestowing any part of this residue upon purposes strictly charitable. The residue, therefore, cannot be said to be given to charitable purposes; and as the trust is too indefinite to be disposed of to any other purpose, it follows, that the residue remains undisposed of, and must be distributed among the next of kin of the testatrix." This decision was on appeal affirmed by Lord Eldon: see 10 Ves. 522. See also *James v. Allen*, 3 Mer. 17; *Williams*

v. *Kershaw*, cited 1 My. & Cr. 298; *Ellis v. Selby*, 1 My. & Cr. 286. So where there was a bequest of a residue "to be given in private charity," it was held by Sir Thomas Plumer, M. R., to be an object too indefinite to be carried into effect. *Ommanney v. Butcher*, Turn. & Russ. 260; see also *Kendall v. Granger*, 5 Beav. 300; *Nash v. Morley*, 5 Beav. 177. So a gift to "charitable or public" purposes was held too indefinite to be carried into effect as a charity. *Vezey v. Jamson*, 1 S. & S. 69. See also the cases collected in the note to *Loscombe v. Wintringham*, 14 Beav. 89.

We may here remark, that long continued *usage* will not be allowed to prevail in contravention to the clearly expressed intention of the founder of a charity (*Attorney-General v. The Masters, &c. of St. Cross*, 1 Eq. Rep. 585; *Attorney-General v. Mayor of Bristol*, 2 J. & W. 321; *Attorney-General v. Fishmongers' Company*, 5 My. & C. 11, 16). But where ancient instruments creating the trust may bear two constructions, the Court will lean to, if not adopt, that construction which has been supported by usage. See *Attorney-General v. Smithies*, 1 Keen, 307; *Rex v. Varlo*, Cowp. 248; *Rex v. Osbourne*, 4 East, 327, 333; *Attorney-General v. Parker*, 3 Atk. 576; 1 Ves. 43; *Archbishop of York v. Stapleton*, 2 Atk. 136; *Chad v. Tilsed*, 2 Brod. & Bing. 403; *Attorney-General v. Drummond*, 1 Dru. & Warr. 353.

As to charitable trusts generally, and the Charitable Trusts Acts, 16 & 17 Vict. c. 137, and 18 & 19 Vict. c. 124, see Tudor's Charitable Trusts.

SHELLEY'S CASE.

Trin. Term, Anno 23 Eliz. in C. B.

[REPORTED 1 Co. 93 b.]

RULE IN SHELLEY'S CASE.]—*Rule, that where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation and not of purchase; so that the ancestor takes the whole estate comprised in the term, that is to say, in the first case, an estate in fee simple, in the second, an estate in fee tail.*

E. S. being tenant in tail general, and having issue two sons, H. and R., and H. the eldest dying in his father's lifetime, leaving a daughter, and his wife enceinte with a son; E. S. suffered a common recovery (the premises being in lease for years) to the use of himself for the term of his life, after his decease to the use of certain persons for twenty-four years, and after to the use of the heirs male of the body of the said E. S., lawfully begotten, and of the heirs male of the body of such heirs male, lawfully begotten, remainder over; and after judgment and the awarding of the writ of seisin, but before its execution, E. S. died; and after his death, and before the death of his eldest son's son, the writ of seisin was executed. The youngest son entered, and the son of the eldest was afterwards born. Held, first, that execution might be sued against the issue in tail, the right of the entail being bound by the judgment; second, that the reversion was not in the recoverors immediately by the judgment before execution; third, that R. took quasi by descent till the birth of the second son, who then became entitled; fourth, that the recovery was good, notwithstanding the death of the tenant in tail on the morning of the day on which it was suffered.

An estate vested by purchase shall not be divested by an afterborn nearer heir.

Effect must be given to every word in a deed, if it may be done, without rejecting any.

Superadded words of limitation, varying the course of descent, operate as words of purchase; as in the case of a limitation to the use of a man for life, and after his decease to the use of his heirs, and the heirs female of their bodies.

A recovery does not bind those who are in by title paramount.

The issue in tail shall avoid all charges by his ancestors, except such as are for his benefit.

A recovery by tenant in fee simple binds his heirs; secus as to a recovery by tenant in tail of a reversion after an estate for life, unless execution was had in his lifetime.

When the means appointed by law to perfect any act become impossible by act of God, without any default in the party, he shall not be prejudiced.

When the heir takes anything which might by possibility have vested in the ancestor, although it first vested in the heir, and never in the ancestor, yet the heir shall be in quasi by descent.

Whoever takes by purchase as heir special, ought to be heir general as well as heir special.

On an exchange at common law, if one enter, and the other die before entry, his heir may, at his election, confirm or avoid the exchange; but if both parties die before execution, the exchange is void.

In the case of things executory, execution has relation to the original act, and it is all one act, though done at different times.

A recovery shall be to the use of the previous deed, unless a contrary intention appear.

In the creation of uses, as well as in wills, the intention of the parties is chiefly to be regarded.

Rule, that on a gift to two, if one only is capable, that one takes the whole.

Distinction between a gift at common law to a man and his wife that shall be, and such a limitation by way of use.

Under a limitation of a use, or a devise to A. for life, remainder to B. if A. renounce, the remainder vests immediately.

NICHOLAS WOLFE (*b*) brought an *ejectione firmæ* of certain land in B., in the county of Sussex, against Henry Shelley, Esq., defendant, and declared on a lease by Richard Shelley, Esq., to which the defendant pleaded not guilty. And a special verdict was found to the effect following, viz. that Edward Shelley and Joan his wife were seised of the manor of Barhamwick, whereof the said land, wherein the said ejectment was supposed, was and is parcel in special tail, that is to say, to them and to the heirs of their two bodies lawfully begotten, and shows how, the remainder to the said Edward and his heirs; and it was further found that the said Edward and Joan had issue Henry, their eldest son, and the said Richard their younger son, and afterwards the said Joan died; and the said Henry, having issue Mary yet living, died in the life of the said Edward, his wife then big with child of the said Henry the now defendant. And afterwards the said Edward Shelley, by indenture, bearing date the 25th of September, in the first and second year of the late king and queen, Philip and Mary, and first delivered the 6th day of October following, did covenant with Cowper and Martin to suffer a recovery of the said manor amongst other things; and that the said recovery should be to the use of the said Edward Shelley for the term of his life, without impeachment of waste; and after his decease, to the use of Mr. Caril and others, for twenty-four years, and after the said twenty-four years ended, then to the use of the heirs male of the body of the said Edward Shelley lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten; and for default of such issue, to the use of the heirs male of the body of John Shelley, of Michael Grove, &c. It was also found, that the said Edward Shelley, the 9th day of October, being the first day of the term, between the hours (*c*) of five and six in the morning died, and afterwards the recovery passed the same day, with a voucher over, and immediately after judgment given, an *habere facias seisinam* was awarded, the wife of the said Henry Shelley being at that time great with child with the defendant. And afterwards, that is to say, the 19th day of October next following, the recovery was executed; and afterwards, the 4th day of December then next following, the wife of the said Henry was delivered of the said Henry now defendant. And it was likewise found, that the said manor was in

(*b*) S. C. 1 And. 69; Mo. 136; Jenk. Cent. 249; Dy. 373, pl. 15.

(*c*) 1 And. 69; Mo. 137, 138; Palm. 312; 1 Sid. 229; Jenk. Cent. 249.

lease for years at the time of the said judgment and recovery, by force of a lease made long before the original writ purchased, upon which the said recovery was had; and that the said Richard Shelley, second son of the said Edward Shelley, and uncle to the said defendant, entered and made a lease to the said Nicholas Wolfe now plaintiff in the *ejectione firmæ*; and that the said Henry Shelley the defendant entered upon the said Nicholas Wolfe, and did eject him. And upon the whole matter aforesaid, the jurors pray the advice and judgment of the Court, if the entry of the said Henry the defendant was lawful or not; and if, by the judgment of the Court, the entry of the said Henry should be deemed unlawful, then the jury found that the defendant was guilty, and assessed damages; and if the entry of the defendant should be deemed by the Court to be lawful, then they found for the defendant, that he was not guilty, &c.

This case was divided into four principal questions: of which

1. The first was, if (d) tenant in tail suffers a common recovery with voucher over, and dies before execution, if execution may be sued against the issue in tail.

2. The second, if tenant in tail makes a lease for years, and afterwards suffers a common recovery, if the reversion be presently by judgment of law in the recoveror before any execution sued.

3. The third, if tenant in tail, having issue two sons and the elder dies in the lifetime of his father, his wife *privement enceinte* with a son, and then tenant in tail suffers a common recovery to the use of himself for term of his life, and after his death to the use of A. and C. for twenty-four years, and after to the use of the heirs male of his body lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten, and presently after judgment an *habere facias seisinam* is awarded, and before the execution, that is to say, between five and six in the morning of the same day in which the recovery was suffered, tenant in tail dies, and after his death and before the birth of the son of the elder son the recovery is executed, by force whereof Richard, the uncle, enters, and after the son of the elder son is born, if his entry upon the uncle be lawful or not.

4. The fourth and last point is, if the uncle in this case may take as a (e) purchaser, forasmuch as the elder son had a daughter, which was heir general and right heir of Edward Shelley, at the time of the exe-

(d) Mo. 137; Co. Litt. 361 b; 1 Co. 106 a.

(e) 1 And. 70; Mo. 137, 139.

cution of the recovery. And this case was argued by (e) Anderson, the Queen's Serjeant, and Gawdy and Fenner, Serjeants, for the plaintiff, and by Popham, Solicitor-General, Cowper and Coke, for the defendant.

And as to the first point, the plaintiff's counsel argued that (f) execution might be sued against the issue in tail; and their principal reason was, because the judgment given against the tenant in tail, and the judgment for the tenant in tail to have in value against the vouchee, bound the right of the estate tail, and the issue in tail shall not avoid it by the statute *de donis conditionalibus*, because the law adjudgeth that in respect of the intended recompence the issue in tail was not prejudiced: as if tenant in tail grant a rent for the release of one who hath a right to the land, it shall bind the issue in tail, because it is for the benefit of the issue, and so not restrained by the said act, as it is agreed in (g) 44 E. 3, 21 b, *Octavian Lumbard's Case*. And if the recovery, upon which execution is had in the life of the tenant in tail, shall not be a bar to the issue, it would be mischievous and a great impeachment to common assurances of lands. And further, it was said, that the right of the estate tail was bound by the judgment and not by the execution; for if the right of the estate tail was not bound by the (h) judgment, it could not be bound or barred by the execution had afterwards.

As to the second point, they conceived that it was not any question, but that the recoverors had not the reversion presently by the (i) judgment, notwithstanding the lands were in lease for years; for they said, that the judgment was that the demandant should recover seisin of the land which was but executory, and could not be executed until execution, entry or claim. As if a common or reversion or any other thing which lieth in grant be granted upon condition, if the condition be broken, the thing granted is not in the grantor before claim; for it was said, that when a man may enter or claim, the law will not adjudge him in possession until (k) entry or claim.

As to (l) the third point, which was the great doubt of the case, they argued, that the said Richard the uncle was in by purchase, and *ex*

(e) Mo. 137.

(f) Mo. 137, 140; 1 Co. 96 a, 106 a; Co. Litt. 361 b.

(g) 1 Co. 96 b; Plowd. 436 b, 466 a; Co. Litt. 343 b; 10 Co. 37 b; 1 Roll. 842; Br. "Charge," 4; Br. "Tail," 6; Doct. & Stud. 49 a; *Manzel's Case*, Plowd. 14 b; 2 Brownl.

67; 20 Ed. 4, 13 b.

(h) 7 Co. 39 a; 10 Co. 38 a.

(i) 1 Co. 96 b; 1 Roll. 270; Ma. 141; Dy. 376. pl. 26; 3 Keb. 699.

(k) Co. Litt. 218 a; 2 Co. 53 b.

(l) 1 Co. 97 b, 106 b.

consequenti the entry of the defendant upon him was not lawful; and this in effect was their principal reason:

Argument,—That which originally vests in the heir, and was not in the ancestor, vests in the heir by purchase.

But this use (*m*) originally vested in Richard Shelley, and never was vested in Edward Shelley. And therefore the use vested in Richard Shelley by purchase.

That the use never vested in Edward Shelley they said was manifest, for before the recovery executed no (*n*) use could be raised, for the use ought to be raised out of the estate of the recoverors; but the recovery was not executed in the life of Edward Shelley, and therefore no use could rise during his life. And Anderson, Serjeant, said, it was impossible that Richard Shelley should be in by descent, because no right, title, action, use or other thing touching the uses limited by the said indentures, did descend to Richard, but only a thing intended to him, which intent in his life received no perfection; and therefore this case was not like any case where a right, title, action, use or other thing descendeth from the ancestor to the heir, but is like the case in (*o*) 5 E. 4, 6 a, where the wife consents to a ravisher, having issue a daughter, the daughter enters by the statute of (*p*) 6 R. 2, a son is afterwards born, he shall never devest it, for it vested in the daughter by purchase; so is the case agreed in 9 H. 7, 25 a. If a lease be made to one for life, the remainder to the right heirs of J. S., if J. S. dies having a daughter, his wife with child with a son, the daughter claims it by purchase, and therefore the son born after shall never devest it; but they relied principally upon the case (*q*) in 9 H. 7, 25 a, that if a condition descends to the daughter, and she enters for the condition broken, the son born afterwards shall never enter upon her, and yet there she is in by descent, and the title of her entry, that is to say, the condition she hath as heir; and yet because she was the first in whom it vested, the son born after shall not devest it, which is a stronger case than our case at the bar.

And further, it was said by the plaintiff's counsel, that although the recovery had been executed in the life of Edward Shelley, yet ought

(*m*) Mo. 137.

(*n*) 1 And. 70.

(*o*) 3 Co. 39 b, 61 b; Fitz. "Assize," 27; Plowd. 43 a, 56 b; Br. "Done," 28; Br. "Entre Congeable," 94; 9 H. 7, 25 b; 1 Co. 98 b, 137 b.

(*p*) Br. "Entre Congeable," 94; Plowd.

42 b, 45 b; 2 Inst. 434; Long. Quinto, E. 4, 58 a; 1 H. 6, 1 a; Fitz. "Coron." 1; Bro. "Rape," 4; Br. "Appeal," 48; Br. "Parliament," 89; Stamf. "Coron." 82; 6 R. 2, cap. 6.

(*q*) Mo. 150; 1 Co. 99 a; 8 Co. 76 a; Hob. 31; Cro. Car. 87.

the heir male to take by purchase ; for they said, that the manner of the limitation of the uses is to be observed in this case, which is first to Edward Shelley for the term of his life, and after his death to the use of others for the term of twenty-four years, and after the twenty-four years ended, then to the use of the heirs male of the body of the said Edward Shelley lawfully begotten, and of the heirs (r) male of the body of the said heirs male lawfully begotten ; in which case they said, that if the heirs male of the body of Edward Shelley should be words of limitation, then the subsequent words, viz. and of the heirs male of the body of the said heirs male lawfully begotten, would be void ; for words of limitation cannot be added and joined to words of limitation, but to words of purchase. And they said, that forasmuch as those words, heirs male of the body of Edward Shelley, might be words of purchase, that in this case the law will construe and take them as words of purchase, for otherwise the said subsequent words (and of the heirs male of their bodies) would be void. And such (s) construction is always to be made (of a deed) that all the words (if possible) agreeable to reason and conformable to law may take effect according to the intent of the parties, without rejecting of any, or by any construction to make them void. And therefore Anderson put this case, if a man makes a feoffment in fee, to the use of himself for life, and after his decease to the use of his heirs, in this case the fee simple is executed ; but in the same case, if the limitation be to the use of himself for life, and after his decease to the use of his heirs, and of their heirs female of their bodies, in this case these words (his heirs) are words of purchase and not of limitation ; for then the subsequent words (and of their heirs female of their bodies) would be void. So they concluded this point ; first, that no use could rise until execution sued ; no execution was sued in the life of Edward Shelley, and then it first vested in Richard as a purchaser before the son of the elder son was born : and for the latter reason, admitting the recovery had been executed, notwithstanding the heirs male of the body of Edward Shelley should take by purchase, and so *quacunque via data*, they concluded, that the use first settled in Richard Shelley as a mere purchaser. And (t) as to the latter point, which in effect (admitting, as hath been said, that the said words were words of purchase) was,

(r) 1 And. 70 ; Mo. 138, 140 ; Cro. Car. Cro. Eliz. 208.
24 ; 1 Co. 104 a. (t) 1 Co. 106 b.
(s) Mo. 138 ; Co. Litt. 313 a ; 6 Co. 64 b ;

that a lease for life is made to A., the remainder to the heirs male of the body of Edward Shelley; if in this case Richard may take this estate tail by purchase as heir male, notwithstanding his elder brother had issue a daughter which is living, and who was his heir general; they said there was no difference as to that, where an estate tail is limited by gift executed and when by way of remainder, nor when the heir male of the body claims by descent, nor when by purchase; for if an estate had been made to Edward Shelley, and to the heirs male of his body, in that case Richard Shelley without doubt should have had the land by descent, and that by a construction on the statute *de donis conditionalibus*, to fulfil the mind and intent of the donor.

And so it is if I give lands to a man and to his heirs female, and the donee hath issue male and female, although the female be not heir general, yet she is heir special to claim *per formam doni*. And this was in effect the substance of the three arguments published and delivered at large on the plaintiff's part before the Justices of the Queen's Bench in Hilary and Easter Terms, in the twenty-third year of the reign of Queen Elizabeth.

On the defendant's part it was argued contrary. As to the (u) first point it was argued that execution could not be sued against the issue in tail; and therefore as it hath been agreed that the judgment only against the tenant in tail did not bind, but the judgment to have in recompence *sequitur à concessis*, that the issue in tail cannot be barred: and for proof that in this case the issue in tail could not have any recompence, first, it was said, that if execution could not be sued against the issue in tail, then the issue in tail could not take any benefit of the recompence. For it is agreed in (x) 17 E. 2, title "Recovery in Value," Fitz. 33 (y), 1 E. 3, fo. 12, that he who vouches shall never have execution against the vouchee before execution sued against himself; so that the judgment to recover over in value is not material (as the case is) unless execution may be sued against the issue, which cannot be in this case. For he who is in of an estate in possession by title paramount a recovery, shall not be bound by the same recovery; but the issue in tail in our case is in of an estate in possession which he had by title paramount the recovery, and therefore the issue in tail shall not be bound by the recovery. In proof of the first proposition it hath been adjudged in (z) 28 H. 8,

(u) Co. Litt. 361 b; 1 Co. 94 b; 1 And.
70; Mo. 137, 139; 1 Co. 136 a.

Digges.

(y) Co. Litt. 376 b.

(z) Co. Litt. 376 b; 17 Ed. 4, 4 a, by

(z) Wentw. 148, 149; Yelv. 33, 33; 1

reported by Serjeant Bendloe, which case began 26 H. 8, in the book at large, where the case was, that an executor having judgment to recover a debt due to the testator, and dying intestate before execution, and the ordinary committing the administration of the first testator to one, that the administrator could not sue execution upon that recovery, because he deriveth his interest from and represents the person of the testator, and so before the recovery. (u) So it is if there be two joint-tenants, and one makes a lease for years rendering rent, the lessor dies, the other shall not have the rent, because he claims by the first feoffor which is paramount the lease and the reservation. (x) So if tenant for life makes a lease for years reserving rent, and afterwards surrenders to him in the reversion, not being in by force of his ancient reversion, he cannot have the rent newly reserved: and in proof that the issue in tail was in by a title paramount the recovery, he said, that the issue in tail shall avoid all charges, leases and other incumbrances made by his ancestor, because he claims *per formam doni*. And if tenant in fee simple makes a lease for life, and suffers a recovery, he and his heirs are for ever concluded; but he said, if tenant in tail be of a reversion expectant on an estate for life, and he suffers a recovery, and hath judgment to recover over in value, yet his issue shall avoid the recovery, for he shall not be estopped, because he claims in *per formam doni*: but if execution had been sued in the life of tenant in tail, then forasmuch as the estate tail doth not descend to the issue, and forasmuch as then he may sue execution over, it is good reason to bar the estate tail; but if the issue in tail be in by lawful descent in possession of the estate tail before the recovery executed, then the law seems to be otherwise. (y) *Octavian Lombard's Case* in 44 E. 3, which hath been cited on the other side, was not against this opinion, for there the issue in tail reaped the benefit of the release made to his ancestor; but in our case the issue in tail being in of an estate tail paramount the recovery, cannot take benefit of the recompence over. And wherefore should not the issue in tail in this case be at liberty to choose, whether he will take the estate tail, or otherwise to admit execution to be sued

Jones, 214, 248; Mo. 4, 139, 680; O. Ben. 2, pl. 5; N. Ben. 18, pl. 24; 5 Co. 9 b; Cro. Jac. 4, 394; Cro. Car. 167, 227, 451; 2 Saund. 149; 1 Roll. 890, 907; 1 Sid. 29; March, 9; 1 And. 23; Finch, 4 b, 6 a; 17 Car. 2, c. 8; Swinb. 323; Cro. Eliz. 435.

(u) Mo. 139; Finch, 4 b; Co. Litt. 185 a, 318 a; Poph. 145; Dy. 187, pl. 5; Roll. Rep. 309, 442; Cro. Jac. 417.

(x) Mo. 94, 139; 11 Co. 18 a; Co. Litt. 185 a, 318 a.

(y) 44 E. 3, 21, b. 3; Keb. 287; Hard. 209, 384; Plowd. 436 b, 466 a; *Manxel's Case*, Plowd. 14 b, 15 a; Sty. 320; 1 Co. 94 a; Co. Litt. 343 b; Br. "Charge," 4; Br. "Tail," 6; 1 Roll. 812; 10 Co. 37 b; Doct. & Stud. 49 a; 2 Brownl. 67; 2 Bulstr. 43; Raym. 349.

against him, and to sue execution over in value, as well as in 14 H. 6, fol. 2, in the case of exchange; in which case, although assets of greater value descend to him than the land in tail, yet he may choose to have the one or the other at his election?

And if tenant in tail be disseised and levies a fine to the disseisor without warranty and dies, if the issue in tail enters and is seised by force of the tail before all the proclamations are made, although the proclamations be afterwards made, yet that does not bar the issue: so if tenant in tail levies a fine and disseises the conusee, and (z) dies before all the proclamations are made, and after the proclamations in the time of the issue in tail pass, yet the issue is not bound thereby, by the statute of (a) 32 H. 8; and yet the words of the act are, that all fines after proclamations, &c. shall bar, &c.; but it hath always been held, if the issue in tail be remitted and seised by force of the tail before the bar be complete, that is to say, before the proclamation be passed, the issue is not bound; so in this case, before execution sued the issue in tail is seised by force of the tail, and in *per formam doni* before the bar is complete, and therefore the execution cannot be sued against him, nor can any bar after the death of his father be made to the estate tail which is descended to him in possession. And it is agreed in (b) 7 E. 3, 335, that if a disseisor at the common law before the statute of non-claim had levied a fine, or suffered a judgment in a writ of right, until execution sued, they were not bars, for the year shall be accounted after the transmutation of the possession by execution of the fine or recovery; and so it is said in *Stowel's Case*, Plowd. Com. 357 b; and the books in (c) 28 Ass. pl. 32 (d); 7 H. 4, fol. 17, 17 b; Plowd. Com. 55 b; 12 E. 4, fol. 20 a, were cited, that (e) execution upon a feigned recovery against the father, cannot be sued against the issue in tail.

To the (f) second point they argued, that forasmuch as the land was in (g) lease for years, that the recovery was executed by judgment of law presently after the judgment. And a difference was taken when the lands were in the possession of the tenant at the time of the judgment, and when the lands were in lease for years. And their reason

(z) Poph. 63; 1 And. 43, 2 And. 177; Owen, 75.

(a) 32 H. 8, 36; Co. Litt. 262 a; 3 Co. 51 a, 87 a; 10 Co. 50 a.

(b) Plowd. 357; Fitz. "Contin. Claim," 7; Co. Litt. 262.

(c) Br. "Fauxifier de Recovery," 19;

Fitz. "Assize," 271.

(d) Br. "Fauxifier de Recovery," 10; Br. "Remitter," 9.

(e) Co. Litt. 361 b; Dy. 35, pl. 28; 376, pl. 26; 10 Co. 38 a; 12 E. 4, 15 a.

(f) 1 Co. 24 a, b, 106 b.

(g) Palm. 256; Mo. 139.

of the difference was, because the recoverors in the one case may sue execution, and in the other case may not; and because the recoverors cannot sue execution, the law will therefore adjudge them in execution presently; the reason thereof is, that otherwise the lessee during the term might commit waste, and would be (*h*) punishable by the recoveror; but if the recoveror may enter or sue execution, then he may prevent it. And therefore, if a fine *sur cognisance de droit tantum* be levied of land in possession, the cognisee hath nothing before entry, as it is agreed, 48 E. 3, fo. 15 b (*i*); 10 H. 6, fo. 16 b; and Litt. in his chap. of Attornment (*h*), fo. 131 b. But if a fine *sur cognisance de droit tantum* be levied of a reversion upon an estate for life or years, or of a seignory, or any other thing which lieth in grant, there the reversion, or thing which lieth in grant passes presently. And it was said, that a common recovery is in nature of a common conveyance, and so it appears, that a reversion or thing which lieth in grant is more easily transferred from one person to another, than an estate of freehold in possession. A condition is executory as well as a judgment; but if the feoffor cannot enter, there the law will adjudge him in possession presently. And therefore it is holden in (*l*) 20 H. 7, fo. 4 b, 20 E. 4, fo. 19 a, and 22 E. 4, that if the condition be collateral, and the feoffee makes a lease back again for years to the feoffor, and then the condition is broke, the law will adjudge the feoffor in of fee simple immediately, because he cannot enter; and yet in that case he may say, that forasmuch as he cannot enter, therefore he ought to make claim; yet the law in that case requires no claim to be made; but in the case before, it is otherwise, where no lease for years had been made back again, and the reason may be for the mischief before mentioned.

The case of Littleton (*m*), fol. 84, was likewise cited, where Littleton is of opinion, that in the case of a condition the fee simple shall be re-vested again in the lessor, because he cannot enter, and the law will adjudge him in possession without entry or claim. It was likewise said, that those things which lie in grant, as in the case before remembered of the fine, they pass to the conusee immediately, by the fine levied; so in the case of a common recovery (which is now become a common assurance and conveyance), such things which lie in grant are

(*h*) Mo. 139; Co. Litt. 266 b.

(*i*) Br. "Attornm." 42; Fitz. "Attornm."

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(*k*) Litt. s. 579, 580; Co. Litt. 319 b, 320 a; Vaugh. 39.

(*l*) 1 Co. 174 a; Br. "Condition," 167; 8 H. 7, 8 a; 4 Co. 53 a; Co. Litt. 218 a, b; 1 Roll. 939; 11 H. 7, 21 b.

(*m*) Litt. 81 b, s. 350; Co. Litt. 216 b.

in the recoveror by the judgment. And therefore there are some opinions in the books, in (n) 22 Ass. pl. 84(o), 45 E. 3, fol. 26 b, and 30 E. 3, fol. 33, that if a man hath judgment to recover a (p) rent, or common, or anything which lieth in grant, there the thing so recovered is in the recoveror by the judgment; for the books say, that the demandant is in seisin immediately by the judgment. And they cited the case in 27 (q) H. 8, fol. 7 a, which is direct in the point, that the recovery is executed immediately by the judgment; the land being in lease for years. So they said, first, that execution could not be sued against issue in tail; secondly, if it was necessary that execution should be had in the life of Edward Shelley, that it was executed by the judgment of the law; and if the judgment was executed by operation of the law, then the estate tail to his heirs male of his body was in Edward Shelley, and consequently the entry of the defendant was without doubt lawful.

But for the argument of the third (r) point, which was the great doubt in the case, admitting the law in both the said points to be against the defendant; that is to say, that execution might be sued against the issue in tail; and that the recovery was not executed in the life of Edward Shelley, but after his death, and before the defendant was born; yet, the defendant's counsel argued, that the defendant's entry was lawful. The first reason in effect was as followeth:—when the law prescribes a means to perfect or settle any right or estate, if by the act of God this means, in some circumstances (as in our case in time), becomes impossible, yet, no party who was to have received benefit, if the means had been with all circumstances executed, shall receive any prejudice for not executing it in such circumstance, which became impossible by the act of God, if everything be performed without laches that the parties might perform; for it would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy prevent, should be construed to the prejudice of any person in whom there was no laches. And therefore the (*præscript*), general rule of law is, that although a man shall not be (s) tenant by the curtesy without actual seisin, yet, of a rent, or of an advowson, if the wife dies before the rent day, or before the avoidance,

(n) Fitz. "Assize," 228; Br. "Seisin," 36.

(o) Co. Litt. 34 b; 1 Co. 94 b.

(p) 1 Roll. 681.

(q) Br. "Assize," 1; Br. "Resceit," 1.

(r) 1 Co. 94 a, b, 95 a, b; 1 Co. 106 b.

(s) 6 Co. 68 a; Co. Litt. 29 a; F. N. B. 149 a; Fitz. "Descent," 3; Fitz. "Bar," 293; Perk. a. 468, 469; Doct. & Stud. 84 a; Br. "Tenant per le Courtesy," 4.

he shall be tenant by the curtesy, as it is agreed in 7 E. 3, '66 a, b, and 3 H. 7, 5 a; for by the act of God it is become impossible for him to have actual possession. Also if lessee for the term of another man's life, be disseised of certain lands, and the disseisor takes the profits of them, now if the disseisee will recover the mesne profits, the means which the law prescribes for it is, that the tenant for the other man's life shall re-enter, and then he shall recover all the mesne profits in an (t) action of trespass; but if the means become impossible by the act of God, by the death of the *cestuy que vie*, so that he cannot re-enter, then he shall have an action of trespass without any re-entry, because the means is become impossible by the act of God, viz. the re-entry, as it is held in (u) 38 H. 6, fol. 28 a. Also if a (x) lessee covenants to leave a wood in as good plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant *quia* (y) *impotentia excusat legem*, as it is held in 40 E. 3, 6 a. So if the (z) father be enfeoffed with warranty to him and to his heirs, and afterwards the father enfeoff his son and heir apparent with warranty, and afterwards dies; now in regard the act of God hath destroyed the warranty between the father and the son, the son shall vouch as heir, although he is in by purchase, because the act of God hath determined the warranty between the father and the son, as it is adjudged in (a) 43 E. 3, 23 b; and 30 E. 3, 22.

So in this case, when Edward Shelley died the morning of the same day that judgment was given, immediately upon the judgment the recoverors sued forth an *habere fac' seisinam*, so that no laches was in any party, but it became impossible by the act of God that execution could be had in the life of Edward Shelley, and therefore execution being had after his decease shall not prejudice the son born after, who at that time was *in utero matris*. The second reason was, because the use vested in R. S. although not directly by descent as to have his age, or to toll an entry, &c., yet in the nature and degree of a descent by reason of the original act begun in the life of the ancestor; and their reason in substance was to this purpose. Where the heir takes any thing which might have vested in the ancestor, the heir should be *in* by descent; then although it first vested in the heir, and never in the

(t) Co. Litt. 257 a; 13 H. 7, 15 b; 9 E. 4, 39 b, by Pigot.

(u) 1 Roll. Rep. 147.

(z) Palm. 549; Hard. 387; Allen, 27.

(y) Hard. 387; 4 Co. 11 a; 5 Co. 22 a;

6 Co. 21 b, 68 a, 69 b; 9 Co. 73 a; 10 Co. 139 b; Co. Litt. 29 a, 384.

(z) 11 Co. 81 a; Co. Litt. 384 b; 2 Roll. 742; 1 Roll. Rep. 180.

(a) Statham, "Age," 2; Lucas, R. 421.

ancestor, yet the heir shall take it in the nature and course of a descent; but in the case here the use might have vested in E. S., and if it had vested in E., then R. S. would have taken by descent, and therefore R., in this case, ought to take this use in the nature and course of a descent. And therefore if a fine had been levied *sur cognisance de droit tantum* to E. Shelley in fee, and after, and before execution, E. had died, and R. had entered before H. was born; now although R. be the first who entereth, yet, forasmuch as this fine was levied to his ancestor and his heirs, so that he claimeth by words of limitation, and forasmuch as the first and original act was done in the life of the father, and because it might have vested in the ancestor, and if it had vested in the ancestor, it had descended,—for this cause Richard had taken it in course and degree of a descent, and the entry of the defendant had been lawful upon him. And yet in that case, R. should not have been *in* directly by descent either to be in (b) ward, or to have had his age, or to have tolled the entry of one who had right; but otherwise it is when the remainder is limited to the right heirs of J. S., &c., for there it beginneth in the son by name of purchase, and never could have vested in the brother, as the book in (c) 9 H. 7, 24, cited by the other side, is agreed. So in the case of ravishment (d), 5 E. 4, fol. 6, which was cited on the other side; for in these cases and all the others which have been put by the other side, the estate vested originally by purchase, and no beginning was in the life of the ancestor, which could ever have vested in the ancestor. And, 6 E. 3, tit. "Age," Bro. 51, if R. S. had a seignory by descent, and afterwards the tenancy had escheated, and after the son is born, in that case the son shall enter upon him; for although the tenancy first vested in him, and never was in the father, yet, because the original cause, viz. the seignory, was in the father, therefore the son shall enter upon the uncle. And *Chapman's Case*, in Plowden's New Reports, fol. 284, was cited, for there it appears, that (e) a covenant was made with Chapman, that he would make a lease for years to Chapman, &c., and before the lease was made Chapman died, and then the lease was made to his executors, so that the term did first commence in the executors; yet, forasmuch as the covenant made to the testator was the cause of the making of the estate

(b) Co. Litt. 76 b; 2 Roll. 38; 11 Hen. 7, 12 a.

(c) 9 H. 7, 25 a; 1 Co. 95 a; Mo. 140 a; 1 Co. 99 a; Cro. Car. 87; 8 Co. 76 a; Hob. 3.

(d) 1 Co. 95 a; 3 Co. 39 b, 61 b; Fitz. "Assize," 27; Plowd. 43 a, 56 b; Br. "Done," 28; Br. "Entre Congeable," 94; 1 Co. 137 b; Fitz. "Age," 46.

(e) 3 Bulstr. 257.

to the executors, for that reason the term was assets in the executor's hands, as well as if it had been made to the testator himself. So in our case, although the land first vested in R., yet it vested by reason of the recovery had against E. S. and the indenture made by him, and therefore R. shall be in course of descent, as well as the executors in the course of executors.

Moreover, admitting that E. S. had (f) exchanged certain land with another, and the other had entered into the land of E. S., but E. S. had died before the entry; the law is clear that the heir of E. S. may enter into the land taken in exchange if he will. And so Perkins clearly takes it, fol. 57 a; then admitting that R. S. had entered into the land taken in exchange, now he is the first in whom the land vests; but because it might have vested in E. S., and because he came to it by words of limitation, the son of the elder son born afterwards shall enter upon him: and yet no right, title, use nor action descends in this case; for at his election the exchange might have been avoided: and so it is, if a man seised of the manor of S. covenants with another that when J. S. shall enfeof him of the manor of D., then he will stand seised of the manor of S., to the use of the covenantee and his heirs; the covenantee dies, his heir within age, J. S. enfeofeth the covenantor; in this case it was holden in (g) *Wood's Case*, 3 Eliz., in the Court of Wards, that the heir shall be adjudged in, in course and nature of a descent; and yet it was neither a right, title, use nor action that descended, but only a possibility of an use, which could neither be released nor discharged; yet it might, if the condition had been performed, have vested in the ancestor, and then the heir had claimed it by descent. And therefore, in that case, the heir was not in by purchase, but in by course of descent. And admitting that in all the cases which have been put, as in the case of ravishment, and in the case of the remainder, &c., he who might first enter dies before entry, and the younger son enters, and afterwards the son of the elder son (h) is born, now it is clear, that the son of the elder son shall devest the land from the uncle, for it might have vested in the ancestor: and as to the case which hath been urged by the plaintiff's counsel in (i),

(f) 1 Co. 105 a; Co. Litt. 50 b, 51 b; Perk. a. 285; 1 Roll. 814. See 9 E. 4, 39.

(g) 2 Roll. 794; 2 Roll. Rep. 13; Hob. 136; Cro. Jac. 409, 512; 1 Vent. 373;

Winch. 55; Lucas, 421, 425; 10 Co. 85 a, b.

(h) 1 Co. 100 a; Co. Litt. 11 b.

(i) 1 Co. 95 a, 98 b; Cro. Car. 87.

9 H. 7, 25, of the condition; the solicitor and Coke said (j), that it might be allowed for law, if the true sense thereof be apprehended. And therefore if the condition be, that the feoffor or his heirs pay the sum of 20*l.*, or do any act before a day certain that they shall re-enter, in that case if the father dies before the day of payment, and the daughter to save the inheritance pays the money, or satisfies the condition; in these cases, peradventure, the son shall not devest it, for if the daughter had not performed the condition the land had been utterly lost. And therefore, in that case, a good argument may be made that the daughter may detain the land, for (k) *qui sentit onus, sentire debet et commodum*. But if the condition was to be performed on the part of the feoffee, or broken in the life of the feoffor, then they said the law was clearly otherwise, for the heir entering for such condition broke shall be in (l) ward, and have his age, and no such special reason as in the case next before.

It was also asked, out of what fountain this use should arise, and who was the mother that conceived this use? and the indenture answers, the recovery. For the indentures say, that the recovery shall be to the uses, &c. Then it was said, if the recovery be the mother which conceive this use, and the fountain out of which it rose, forasmuch as this recovery was had in the life of E. S., although the use slept, and was as *embrio in utero matris* until execution sued, yet the execution being once had, the execution shall respect the recovery and raise the use, which slept before; which use being once awaked or raised, takes its life and essence from the recovery which was had in the life of E. S.; and thereupon some of the defendant's counsel argued in this manner, the execution of everything which is executory always respects the (m) original act or cause executory, and when the execution is done, it hath relation to the thing executory, and all makes but one act or record, although it be performed at several times: and therefore if A. by deed indented covenants with B., that B. shall recover against him the manor of D. within a year next following, and that the recovery and execution thereupon to be had within the said year shall be had to the recoveror in tail, &c., and after the recovery is had within the year, and the execution is sued after the year, in this case it is clear, that although the covenant is not pursued

(j) *Kirtom's Case*, Hob. 5.

(k) 5 Co. 24 b, 100 a; 7 Co. 38 b; Co. Litt. 231 a; 2 Inst. 489; Cart. 142; 3 Keb. 592.

(l) F. N. B. 143; Co. Litt. 76 b.

(m) Cro. Jac. 512; 3 Bulstr. 257; 7 Co. 38 a; 1 Co. 155 b; 2 Co. 75 a, 76 a, 93 a.

in time according to the precise form of it, yet the use shall be guided by the said indentures. So in the same case, if the same recovery betwixt the same parties of the same land was suffered after the year, yet if no other intervenient agreement were between the parties, the recovery shall be intended to be to the uses of the indentures; for variance in time in such case shall not subvert the original agreement and contract of the parties. And it is held in 6 E. 3, 44 b, that if the (n) presentment to a church by an usurper be in time of war, and the institution and induction, which are but as executions of the presentment, be in time of peace, yet it shall be avoided; for the law regards the original act, *et causa et origo est materia negotii*. If a man (o), who is *non compos mentis*, gives himself a mortal wound, and before he dies he becomes of sound memory, and afterwards dies of the same wound; in this case, although he dies of sound memory by reason of his own proper wound, yet because the original cause of his death, viz. the wound, was when he was *non compos mentis*, he shall not be *felo de se*, because the death, &c. hath relation to the original act which was the stroke or wound; which, see 22 E. 3, *Tit. Corone*, 244. And so it is 33 Ass. "Corone," 210. If a servant hath an (p) intent to kill his master, and before execution of his intent goes out of service, and being out of service, executes his purpose, and kills him who was his master, this is petit-treason, for the execution doth respect the original cause, which was the malice conceived when he was servant; and yet if the law should adjudge and make construction according to the several times, then it would be plain, it would be no petit-treason. So in our case, the execution of the use relates to the indentures and recovery.

It was also asked, when after that the execution was had, so that now the use, which before slept, is raised, what is it that governs and directs this use? And the answer is, the indentures. And what is their direction? That the said E. S. shall have it, and after his death the heirs male of his body, so that the indentures direct the use to the heirs male of his body by way of limitation of estate, and not by

(n) 2 Roll. 351; Mod. Rep. 230; 6 E. 3, 41; 2 Co. 93 a; 6 Co. 30 a; F. N. B. 31 i; Darrein Presentment, 4; 7 E. 3; Darrein Presentment, 2; 18 E. 2; Qu. Impedit, 175; Co. Litt. 249 b; F. N. B. 31; 1 Jones, 428.

(o) 3 Inst. 54; Plowd. 260 a; 4 Co. 42 a; Mo. 140; Fitz. "Coron." 244; Stamf. "Co-

ron." 19 b; 8 E. 2, "Coron." 112; 3 E. 3, "Coron." 224.

(p) 3 Bulstr. 257; 33 Ass. pl. 7; Br. "Treas." 15; Br. "Coron." 116; Stamf. "Coron." 10 b; 19 H. 6, 47 b; Hale, pl. "Cor." 23; Dalt. Inst. 337; 3 Inst. 20; Plowd. 260 a.

way of purchase. And from thence this reason was collected ; the indentures direct and govern the manner and quality of the use, but the indentures direct that the heirs male of the body of Edward Shelley shall take it by limitation of estate, and not by name of purchase ; and therefore R. ought to have it as heir by limitation of estate, and not by name of purchase ; for when the execution was had, the indentures immediately guided the use to R., because he was at that time heir male of the body of Edward Shelley, which R. is not heir after the (g) birth of the son of the elder son. Further it was said, admitting all the matter before would not serve for the defendant (which the defendant's counsel held strongly it would), yet it is to be considered, in this case, that the estate vests in R. by way of limitation of use, and not by any conveyance by the common law in possession : and therefore admit our case had been before the making of the stat. of (r) 27 H. 8, and that the recoverors had sued execution after the death of Edward, and before the son of the elder son was born, and then the son of the elder son had been born ; in that case it was asked, which of them should have the subpoena ? and the defendant's counsel conceived that the son of the elder son, although the use did first attach in the uncle, should have the subpoena. For if the intent of Edward Shelley may appear to the Court, that the son of the elder son should have this use, then that is the rule by which the use is to be guided and directed. For at the common law the intent of the parties was the direction of the uses, for they were only determinable, and to be adjudged by the Chancellor who is Judge of equity, and that in Chancery, which is a Court of conscience : and as Bracton saith, fol. 18, *Nihil tam (s) conveniens est naturali æquitati quam voluntatem domini volentis rem suam in alium transferre ratam haberi*. And therefore, in proof that uses are directed by the intent and meaning of the parties, divers cases were cited, 31 H. 6, *Titulo (t) Subpœna*, Fitzherbert, 23 ; Statham, " Conscience," 1. A man being *cestuy que use*, and having an only daughter, declared his intent and meaning to the feoffees, that after his decease his daughter should have his land. And therefore a question arose in Chancery, whether he might revoke this limitation of the use made to his daughter ; and in arguing this case, Fortescue held, that if *cestuy que use* hath issue a daughter, and being sick declares his intent to his feoffee,

(g) 1 Co. 99 a ; Co. Litt. 11 b.

(r) 27 H. 8, c. 10 ; Co. Litt. 272 b, 237 a.

(s) Co. Litt. 36 a ; 6 Co. 64 b.

(t) Dy. 32, pl. 27.

that his daughter shall have his land after his decease ; and after he recovers his health and hath issue a son, now he said it is good conscience that the son should have the subpœna, for he is his heir. Note the reason of Fortescue, because he is his heir. And there Fortescue said, that (u) *conscientia dicitur à con et scio, quasi simul scire cum Deo* ; that is to say, the will of God as near as reason wills. We find likewise in divers other cases in our books, that (x) the intent of the parties is the direction of uses, by a considerable and favourable construction. And therefore it is held in 7 H. 6, fol. 4 b, if a man be seised of land on the part of his (y) mother, and makes a feoffment in fee reserving rent to him and his heirs ; in that case, by the rule of common law, as Littleton says, the rent shall go to the heir on the part of the father : but if a man be seised of lands on the part of the mother, and makes a feoffment in fee to the use of him and his heirs, the book is directly agreed in 5 E. 4, fol. 7 b, that this use shall not go to the (z) heir at the common law ; but forasmuch as the land and living move from the part of the mother, therefore in equity the use which is nothing but a trust and confidence, should go also to the heirs on the part of the mother. Littleton likewise says, that a man shall not have a fee simple by a feoffment or grant without these words (his heirs). And yet the law is plain, that if a man had, before the statute of (a) 27 H. 8, bargained and sold his land for money without these words (his heirs), the bargainee hath a fee simple. And the reason is, because by the common law nothing passeth from the bargainor but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee ; and forasmuch as the law intends that the bargainee paid the very value of the land, therefore in equity, and according to the meaning of the parties, the bargainee had the fee simple without these words (his heirs), as it is held in 27 H. 8, fol. 5 ; 4 E. 6, Br. " Estates," 78 ; 6 E. 6 ; and in the time of H. 8, Br. " Conscience," 25 ; so in our case, although the use first vested in the uncle, admitting the case to be before the stat. of 27 H. 8, yet

(u) Statham, " Conscience," 1 ; Fitz. " Subpœna," 23.

(x) Co. Litt. 49 a.

(y) Co. Litt. 12 b ; Br. " Discent," 11 ; 14 H. 8, 8 b ; Plowd. 132 b ; 8 Co. 54 b.

(z) 1 Co. 122 b, 127 b ; 2 Roll. 780 ; Dy. 134, pl. 9 ; Co. Litt. 13 a, 23 a ; Hob. 31 ; 2 Co. 58 a ; Dall. 61, pl. 14.

(a) Co. Litt. 9 b ; 1 And. 35, ca. 87 ; 1 Co. 87 a.

seeing that the intent of E. S. was to advance the son of his elder son, and since in equity the general heir is to be favoured, therefore the son after-born shall have the subpoena.

Moreover the rule in law is, that if an (*b*) estate be limited to two, the one capable and the other not capable, he who is capable shall take the whole, as the cases are agreed in 17 E. 3, fol. 29, and 18 E. 3, 59. If a (*c*) man gives land to one *et primogenito filio*, if he hath no son the father takes the whole: and so it is, 1 Lib. Ass. 11, et tempore E. 1, taile 24, if a (*d*) man gives lands to a man, and to such a woman as shall be his wife, the man takes the whole; but if a man makes a feoffment in fee, to the use of (*e*) himself and his wife that shall be, and afterwards he marries, his wife shall take jointly with him, as it was held in the *Lord Pawlet's Case*, 17 Eliz. (*f*), Dy. 340, notwithstanding the whole vested at first in the husband. Also the rule of law is, that a (*g*) remainder cannot stand without a particular estate, and yet the book is agreed in (*h*) 37 H. 6, fol. 36 a, that if a (*i*) man makes a feoffment in fee to the use of one for life, and after to the use of another in fee, although the particular tenant refuses, yet the remainder is good. And so it is said in the book in the case of a (*k*) devise. As if a man devises lands for life, the remainder in fee and the tenant for life refuses, yet the remainder is good: and so note, that the limitation in uses and estates given by devises resemble one another. So the Judges there took the construction of devises and of estates conveyed in use to be all one, viz. according to the meaning of the parties (*l*): and admitting in the case here, the land had been of the custom of gavelkind, and upon that it had been asked, if E. S. had

(*b*) Cart. 5.

(*c*) Flowd. 29 b; Cro. Eliz. 58, 334, 121; 2 Roll. 417; 1 Roll. Rep. 325.

(*d*) Mo. 96; 1 And. 42, 316; Dy. 190, pl. 17, 18; 1 And. 5.

(*e*) 1 Co. 130 a, 134 b; Cro. Eliz. 826, 827; Mo. 96, 634; 1 And. 42; 2 Leon. 14, 179, 223; Dy. 274, pl. 42; 12 Co. 48, 49, 56, 57; 3 Leon. 253; 4 Leon. 234; 2 And. 198; Cro. Eliz. 439; 2 Roll. 791.

(*f*) 13 Co. 56; 2 Leon. 14; 1 And. 316; 2 And. 198; Litt. Rep. 290; Mo. 391.

(*g*) Co. Litt. 298 a; Perk. s. 567; 1 Roll.

415, 417.

(*h*) Dy. 310, pl. 79; 127, pl. 54.

(*i*) 1 Co. 154 b.

(*k*) Br. "Devise," 14; Perk. s. 569; Dy. 127, pl. 54.

(*l*) Co. Litt. 23 a; 1 Co. 103 a; Dy. 179, pl. 45; 133, pl. 5; B. N. C. 302; Br. "Discent," 59; Br. "Nosme," 6; 26 H. 8, 4 b; Br. "Custom," 1; Hob. 31; Co. Litt. 10 a; Noy, 106; Davis, 31 a, 36 b; 27 H. 8; Br. "Done" and "Remainder," 42; Jenk. Cent. 220; 11 H. 7, 25 b.

had sundry other sons should the elder son only have had the whole use? Surely he only should not have it, but all equally; and yet if he had taken it by purchase then the elder son only ought to have it. Now the intent of E. S. is to be proved by divers circumstances apparent in the record; 1. If E. S. had intended to have given it to the uncle he never would have given it him by so general a name as (heir male); for if the recovery had been executed in the life of E. S., as was fully intended, then it had been in manner agreed that R. S. could not have had the land, for the heirs male are words of limitation; or if the son of the elder son had been born in the life of E. S., which was impossible for E. S. to have known the contrary, for the defendant was born within one month after his death, then out of all question the uncle could never have had it; and therefore, except you will ground upon absurdities,—the one that E. S. knew that he should die before the recovery executed; the other, that he should die before the birth of the son of his elder son, which none could know but God,—it must be granted that the intent of E. S. was to advance his elder son, and by no means to disinherit him. Also at the time of his death R. S. was eighteen years old; and therefore if he intended to advance R. he would not have given his lands to his trusty friends, Mr. Carill and others, for twenty-four years: but without doubt he intended the son of his elder son should have it; and that moved him to devise such a term which might be ended when the defendant should be of fit age to receive and govern his living. The reason why the said E. S. suffered the said recovery was (as it seems) because Mary, daughter of his eldest son, named in the special verdict, would have inherited: and if the wife of his elder son had been delivered of a daughter, then had the land gone out of his name, and therefore for the continuance of the land in his name and family he suffered the said recovery; and therefore, it being by way of limitation of use, the son of the elder son ought to have it, and especially inasmuch as no rule in law in our case is impugned, but it stands well, as hath been proved before with the rule of the common law. And one of the defendant's counsel said, that at the common law a use being but a trust and confidence, and, as is said in 14 H. 8, resting only in privity betwixt those who had notice thereof; and forasmuch as the consciences of the feoffees

and others who were trusted became too large and would not perform the confidence reposed in them, but made feoffments upon divers considerations to strangers not having notice of the uses, and by divers other fraudulent devices, did deceive and defraud those to whose uses they were seised; therefore first was the statute of (m) 1 R. 3 made, by which authority was given to *cestuy que use* to enter and make a feoffment; but after that statute the feoffees oftentimes did prevent the feoffment of *cestuy que use* by subtle and cunning practices, yet defrauding the *cestuy que use* and not discharging the trust reposed in them; and therefore to take away all the power and means of deceiving by the feoffees the stat. of 27 H. 8 was made. And therefore it is holden for the better opinion at this day, that for the raising of future uses after the statute the (n) regress of the feoffees is not requisite, and that they have not power to bar these future uses, for the statute hath transferred all the estate out of them. But he said, in our case, if the suing of the execution after the death of E. S. and before the birth of the son of the elder son, should make the uncle have the land, then it would rest in the disposition and pleasure of the recoverors whom they would make to inherit; for then it would follow, that if they enter and execute the recovery before the birth of the son of the elder son, then the uncle should have it, and if they would not enter until after the birth of the son of the elder son, then without all question the son of the elder son should have the land; so that by this construction the matter would lie in the breast of the recoverors who were but instruments and not persons in any manner trusted to settle the inheritance in whom they pleased, which was never any part of the meaning of E. S. and which is very absurd in reason, and would be mischievous, that the inheritance of any man should be at the appointment and discre-

(m) 1 Co. 123 a, b; 131 b; 1 R. 3, c. 1; 1 And. 86, 320, 331, 333, 334; 1 Co. 87 a, 88 a, 123 a, b, 128 b, 129 a, 131 b, 132 a, 133 b, 135 a, 147 b; 2 And. 74, 87, 136; Dy. 143, pl. 54, 57; pl. 74; pl. 14; 143, pl. 54; 283; pl. 30; 291, pl. 65; 330, pl. 17; 369, pl. 50; Rastal. Uses, 4; Godb. 306; 10 Co. 49 a; Palm. 352; 1 Roll. Rep. 155, 333; 2 Roll. Rep. 314, 316, 320, 334, 335, 336, 418, 429; Cro. Eliz. 187; 1 Leon. 299; 2 Leon. 153; 15 H. 8, 12 b, 29 b; 17 H. 7;

Kel. 41 b, 42 a; Perk. a. 544; Doct. & Stud. 98 b; 7 Co. 14 a; Plowd. 349 b, 351 b; 6 H. 7, 3 a; 19 H. 8, 13 a; 27 H. 8, 29 b; 14 H. 8, 4 b; 4 H. 8, 29 b; Br. "Feoffment al Uses," 2, 3, 10, 18, 21, 22, 25, 40, 43, 56, 64; Br. "Entre Congeable," 123; Br. "Fines, Levées de Terres," 107; 7 H. 7, 6 b; Poph. 80; B. N. C. 307.

(n) 1 Co. 130 b, 128 a; 2 Roll. Abr. 797; Wigg & Villers.

tion of two strangers, who were named only as instruments and never in any manner trusted, and it would be a greater mischief than any was at the common law. Also, as this case is, if the sheriff had executed the recovery upon the day on which the writ of execution was sued forth, then it had been evident that the son of the elder son should have had the land, for then had execution in judgment of law been in the life of E. S. But by the construction which hath been made it would likewise be in the power of the sheriff to settle the inheritance in whom he pleased; for if he had executed the recovery the same day, as might have been done, or after the birth of the son of the elder son, then the son of the elder son should have had the land; but *uno absurdo dato infinita sequuntur*. And therefore, for the avoidance of these mischiefs and absurdities, the law will adjudge R. in the land in course and nature of a descent, and then all the mischiefs and absurdities are avoided, and no ground or rule in the law is thwarted.

And note, the stat. of (n) 27 H. 8 is, that *cestuy que use* shall have the possession to all intents, constructions and purposes in law, and of and in such like estates as they had or ought to have in the use; and that he shall have the possession after such quality, manner, form and condition as they had before had, or have had the use, trust or confidence; so if the uncle before the statute had had the use, trust or confidence in nature and course of a descent, yet the son of the eldest son shall divest the use, and have the subpœna; and because the statute executes the possession after such quality, manner, form and condition as the use, trust or confidence was in them; for these causes the possession executed by the statute ought to be subject to the entry of the son of the elder son. And therefore if *cestuy que use* had issue a daughter, and died before the stat. of 27 H. 8, his wife being great with child with a son, and before the birth of the son the statute had been made, so that the possession had first vested by force of the statute in the daughter, yet the son born after might enter upon her, for the daughter had the possession in the same quality and condition as she had the use, but she had the use by descent, and subject to be divested by the birth of the son, and therefore he ought to have the possession by the statute in the same quality and degree, and that is in

(n) Co. Litt. 137 b; 4 Leon. 198; Dy. 149.

the nature and course of descent. But in the case of descent, the son after-born shall enter upon the daughter, and therefore the son in this case shall enter upon the daughter; and the like construction upon the like case hath been made before this time. Therefore Mountagu in *Wimbishe's Case*, and Plowden in *Plowd. Com. fol. 56 b*, held that if a (o) woman hath a jointure made her by her husband in tail, and hath issue a daughter being great with child with a son, and before the birth of the son she discontinues with warranty; now the stat. of 11 H. 7 saith, that such person to whom the title after the death of such wife doth appertain shall enter into the lands, and shall possess and enjoy the same according to their title to the same, as if no such discontinuance had been made; and therefore he held clearly, that although the daughter after such discontinuance first entereth, yet the son born after shall enter upon her by reason of the words of the stat. of (p) 11 H. 7, for the words are, that she ought to enjoy the same according to her title; but her title is in tail, and therefore after the birth of the son, he being next heir in tail, the title of the tail shall be devolved from her to the son.

So in our case the stat. of 27 H. 8 saith, that *cestuy que use* shall have the possession in the same quality, manner, form and condition as he had the use. And therefore if a use were limited before the statute to John S. and Jane at Gappe, and to their heirs, and afterwards they intermarry, and after the statute is made by which the possession is executed to them and their heirs during the coverture, yet they shall not have a divided estate, but the like (q) moieties as they had in the use. So if *cestuy que use* be of certain lands held by priority and of other land by (r) posteriority, and after the statute is made, by which execution is made of the possession of both at the same time, yet he shall have the possession of both in the same quality as he had the use, and all that by the express words of the statute. And it is to be noted, that the stat. of 27 H. 8, doth not speak only of uses but also of trusts and confidence; so that although no use rose in the time of the life of E. S., yet there was a trust and confidence expressed in his

(o) V. 3 Co. 50 b, 61 b, 62 a; Co. Litt. 198; Dy. 159, pl. 82.
326 b, 365 b.

(r) Co. Litt. 23 a; 2 Inst. 392; 2 Roll.

(p) 11 H. 7, c. 20.

37; Hob. 27; 28 H. 8; Dy. 11, 12.

(q) Mo. 92; Co. Litt. 187 b; 4 Leon.

life. And therefore when the use is once raised it ought to be vested according to the trust and confidence which E. S. intended and declared by the indentures.

Lastly, the defendant's counsel argued that the uncle could not have the land as a purchaser, admitting the remainder had been limited to the right heirs male of the body of E. S., in regard the elder son of E. S. had issue Mary his daughter, who is yet alive, as appears by the record, and who is heir to E. S. It hath been said, that although Mary at the time of the death of E. S. was heir general, yet the said R. was at that time heir male of the body of E. S. And therefore he might, as special heir male of the body of E. S., take the remainder, although Mary is heir general; and therefore it hath been said, that if lands had been given to E. S. and to the heirs male of his body lawfully begotten, that in that case, after his death, R. S., as heir male *per formam doni*, shall inherit, although the daughter of the elder son was general heir to E. S. To that they answered and took a difference when the heir male of the body claims by descent and when he claims by purchase; for in descents the law is as hath been alleged, but it is otherwise in cases of purchase. This difference was proved by the case in 37 H. 8, Br. "Done," 42. If a man makes a gift in tail of lands in (s) gavelkind to a man and his heirs male of his body lawfully begotten, and hath issue four sons, in this case all the sons shall inherit: but if a lease for life be made of lands in gavelkind, the remainder to the right heirs of J. S., and J. S. dies, having issue four sons, in this case the eldest son only shall have the remainder, for there can be but one right heir in the case of purchase.

And so is Elleker's opinion expressly in 9 H. 6, fol. 24 a. If a man makes a lease for life, the remainder to the right heirs female of the body of J. S., and J. S. hath issue a son and a daughter and dieth, in this case the daughter shall not take the remainder, for she is not heir female to take by (t) purchase. And yet it is plain, that if a gift in tail had been made to J. S. himself, and to the heirs female of his

(s) 11 H. 7, 25 b; Dy. 179, pl. 45; 133, pl. 5; Co. Litt. 10 a, 23 a; 1 Co. 101 a; B. N. C. 302; Br. "Discent," 59; Br. "Nosme," 6; 26 H. 8, 4 b; Br. "Custom,"

1; Hob. 31; Noy, 106; Dav. 31 a, 36 b; Jenk. Cent. 220; 1 Co. 101 a.

(t) 2 Roll. 416; Co. Litt. 24 b, 25, 164; Hob. 31; Mod. Rep. 161.

body, and J. S. dieth, having issue a son and a daughter, the daughter should have had the land by descent. Also in 37 H. 8, Br. "Done," 61, it appears, that the Lord (u) Hussey made a feoffment in fee to use of Anne his wife for life, and after to the use of the heirs of his body, and after the Lord Hussey was attainted of treason, and although Brook had not expressed the judgment, yet it was said, it was adjudged, that the right heir of his body could not as purchaser take the remainder, because he was not heir of his body to take it by purchase, by reason of the attainder of his father. And yet before the statute of (x) 26 H. 8, if tenant in tail had committed high treason, the land had descended. And in Brook's Reports aforesaid, it appears, that there the Master of the Rolls took the difference between a gift in possession to a man and to his heirs female of his body, and a lease for his life, the remainder to the right heirs female of his body; for in case of a remainder (as he said), she ought to be heir indeed, or else she can never claim it by purchase. So it appears by these authorities, that in case of purchase, the heir male of the body ought to be heir indeed. And forasmuch as in our case the uncle was not heir male, for a man cannot have two heirs to claim by purchase, therefore as purchaser the uncle cannot claim it. But it hath been said, that the statute *De donis conditionalibus*, aids and helps the heir male of the body to take, for that the will of the donor appears, that the heir male of his body should have the land; and the statute saith, *quod voluntas donatoris secundum formam in charta doni sui manifeste expressa, de cætero observatur*. In answering which, one of the defendant's counsel declared the reason of the other cases and authorities which had been cited, and of the difference which was taken before, and therefore he said, that the statute *De donis conditionalibus* did not help this case. Mr. (y) Littleton in his chapter of "Estate tail," saith, "that every gift in tail within the statute *De donis conditionalibus*, before the making

(u) Br. N. C. 303; Hob. 31; Br. "Nosome," 1, 40.

(x) 26 H. 8, c. 13; Co. Litt. 372 b; 9 Co. 140 a; 3 Inst. 19; 3 Co. 10 a, b; 7 Co. 33 a, 34 a, b; 4 Inst. 42; Palm. 439; 12 Co. 6; Hetl. 151, 157; 1 Leon. 21; Godb. 300, 303, 307, 308, 309, 311, 313, 315, 321, 322, 323, 324; Co. Litt. 392 b; Plowd.

552 b; Hob. 334, 339, 340, 341, 343, 344, 346, 347, 348; Dy. 332, pl. 27; 343, pl. 56; Co. Ent. 442 a; 1 Roll. Rep. 162; Cro. Car. 428; 2 Roll. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508; 1 Jones, 70, 71, 75, 76, 77, 80; 1 Co. 42 a.

(y) Litt. a. 13; Co. Litt. 18 b, 19 a.

of that statute, was a fee simple at the common law ; and therefore he put the case before the statute *De donis conditionalibus*, and examined if the same had been a fee simple conditional before the said statute, for otherwise it cannot be an estate in fee tail by the statute. For he said that the statute *De donis conditionalibus* was a nurse and no mother of estates of inheritances tail, and that it preserved the estates of inheritances in fee tail, but did not beget or procreate any estates tail which were not fee simple conditional before. And therefore he took the law to be clear, that if a man gives land to a man (x) *et semini suo*, or to a man *et liberis suis de corpore*, or *prolibus suis*, or *exitibus suis*, or *pueris suis de corpore*, in these cases the donee hath no estate in fee tail, but only an estate for term of life ; for if such gifts had been made before the statute, they had been no fee simples conditional ; and therefore by Mr. Littleton's rule, no estate tail by the statute *De donis conditionalibus*. For the statute creates no new inheritances which were no inheritances at the common law, but only nurses and preserves those which were estates of inheritance at the common law. And therefore the law was taken in the case of Martin Hastings of Norfolk for the manor of Elsing, and where an estate was made to one of his ancestors, and to the (a) issue male of his body, that in that case he had but an estate for life. And so it was held by Sir Roger Manwood, then one of the Justices of the Common Pleas, clearly in the argument of (b), *Clatch's Case*, anno 16 Eliz., and therefore he examined the case here before the said statute ; and he took it without question, that if a lease had been made for life, the remainder to the heirs male of the body of J. S., that in that case, if J. S. had issue two sons, and the eldest son having issue a daughter died in the life of J. S., and then J. S. had died ; that in that case the younger son of J. S. after his death cannot take this fee simple conditional by the common law, for he was not heir male of the body to take this fee simple by (c) purchase ; for first he ought to be heir, and secondly he ought to be heir male.

(x) Co. Litt. 9 b, 20 a ; Bridg. 135 ; 6 Co. 16, 17 a, b.

(a) 1 And. 132 ; Raym. 284 ; 2 Leon. 35 ; Mo. 371 ; Cro. Eliz. 40 ; Sav. 75.

(b) Dy. 330, pl. 20 ; Hard. 149 ; Vaugh. 267, 271 ; 1 Keb. 30, 531 ; 1 Bulst. 180,

273 ; Palm. 131 ; 2 Roll. 196, 218 ; 3 Bulst. 195 ; Cro. Jac. 656 ; 2 Keb. 193, 196, 262 ; 2 Leon. 42 ; 3 Leon. 117, 167 ; 1 Sid. 148 ; 1 Roll. 825 ; Mo. 362 ; 2 Bulst. 102.

(c) Palm. 5 ; Dy. 374, pl. 15 ; B. N. C. 303.

And in that case, if J. S. had been attainted of treason or felony, the heir male of his body could never have taken the remainder, for he was not heir, which might be the reason of the Lord Hussey's case before cited. And it is holden in 12 E. 3, tit. "Variance," 77, that where a man makes a gift to the husband and wife, and to the heirs of the body of the husband, and if the husband and wife die without issue of their two bodies, that then it shall remain over; in that case although the will of the donor appears, that the wife shall be also donee in special tail, yet forasmuch as by the order of the common law she could not have an estate of fee simple conditional, for that cause she could not have an estate tail by the statute. But in the said case where lands are given to a man and the heirs female of his body, here is an estate of inheritance vested in the donee, which estate of inheritance the statute *De donis conditionalibus* directs to the heir female by descent, although there be an issue male.

And as to what hath been objected, that forasmuch as the limitation was to the heirs (*d*) male of the body of Edward Shelley, and of the heirs male of the bodies of the heirs male lawfully begotten, that the heirs male of the body of Edward Shelley should be purchasers, for otherwise the subsequent words would be void; the defendant's counsel answered, that it is a rule in law, when the (*e*) ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail; that always in such cases "the (*f*) heirs" are words of limitation of the estate, and not words of purchase. And that appears in (*g*) 40 E. 3, fol. 9 a b, in the *Provost of Beverley's Case*, in 38 E. 3, fol. 31 b; 24 E. 3, 36 b; 27 E. 3, fol. 87 a; and in divers other books. So, inasmuch as in this case Edward Shelley took an estate of freehold, and after an estate is limited to his heirs male of his body, the heirs male of his body must of necessity take by descent, and cannot be purchasers; otherwise is it where an estate for years is limited to the ancestor, the remainder to another for life, the remainder

(*d*) Cro. Car. 24; Cas. t. Hard. 160; 2 Keb. 122, 340; Palm. 224; Litt. Rep. 261, Wils. 222.

(*e*) 1 Roll. 627; 2 Roll. 417, 418; Mo. 720; Cro. Eliz. 355; Co. Litt. 17 b, 22 b, 376 b; 1 Vent. 374; Raym. 284, 317; 2

(*f*) 1 Co. 105 a.

(*g*) 11 H. 4, 74 b; Br. "Estate," 6; Br. "Discent," 6; Br. "Relief," 2.

to the right heirs of the lessee for years, there his heirs are purchasers. Or if the remainder be limited to the (h) heir in the singular number upon a lease for life, there the heir takes an estate for term of life by purchase. And if it should be admitted that, in regard of the said subsequent words, the right heirs male should have by purchase to them and the heirs male of their bodies, then a violence would be offered as well to the words as to the meaning of the party, for if the heir male of the body of Edward Shelley should take as purchaser, then all the other issue male of the body of Edward Shelley would be excluded to take anything by the limitation, and it would be against the express limitation of the party. For the limitation is to the use of the heir male of the body of Edward Shelley, and of the heirs male of their bodies begotten, and for default of such issue, to divers other persons in remainders. So if Richard Shelley being the heir male of the body of Edward Shelley at the time of his death, should take by purchase, then the heirs male of the body of Richard Shelley only would be inheritable, and no other of the sons of Edward Shelley nor their heirs male; and consequently, if Richard Shelley should die without issue male, the land would remain over to strangers, and all the other sons of Edward Shelley which he then had and might afterwards have, and their issues, would be utterly disinherited, because the words were in the plural number, heirs male of the body of Edward Shelley, the former construction will be against the very letter of the indentures, for by that means the plural number will be reduced to the singular number, that is to say, to one heir male of the body of Edward Shelley only; and forasmuch as the first words, viz. "heirs male of the body of Edward Shelley," include the subsequent words, viz. "the heirs male of their bodies," for every heir male begotten of the body of the heir male of Edward Shelley, is in construction of law an heir male of the body of Edward Shelley himself; for this reason, the subsequent words are words declaratory, and do not restrain the former words. As in the case of (i) Littleton if a man makes a feoffment in fee, *ita quod* the feoffee shall do such an act, in that case Littleton said, it is commonly used in

(h) 1 Co. 66 b; Raym. 333; 3 Keb. 18, 99, 176; Godb. 155; 2 Sid. 51; 2 Roll. Rep. 256; Plowd. 29 b; Palm. 404; Hetl. 76; Sty. 260; 1 Roll. 832; 2 Roll. 253,

417; 1 Bulstr. 222, 223; Mo. 583; Cro. Eliz. 313; Owen, 148; Co. Litt. 8; Cro. Jac. 145.

(i) Litt. s. 331; Co. Litt. 204 b.

such cases to have also these words (and if the act be not done, it shall be lawful for the feoffor to re-enter), which he said was more than was necessary, for the first words are sufficient in law and include them; yet, he said, they are well put in, to declare and express the law to lay-people.

And lastly, in this case, if Richard Shelley should not be in in course and nature of a descent, then he could not take at all; for when an estate is made to a man, and after in the same deed (to limit the quality of the estate) a further limitation is made to his heirs, or to the heirs of his body, in all these cases his heirs or the heirs of his body shall never take as purchasers; but in this case these words, "heirs male of the body of Edward Shelley," were words of limitation; and therefore the heir male of the body cannot take as a purchaser. And in proof of the first proposition it was said, that this is the reason of the book in (k) 40 Ass. pl. 19, and of *Mr. Littleton's Case*, fol. 128, that if a man grants a reversion or a seignory by deed to J. S. and his heirs, if the grantee dies before (l) attornment, the attornment to the heir is void, for if the attornment should be good, then the heir would be in as a purchaser, where by the grant and meaning of the parties these words, "his (m) heirs," were words of limitation to limit the estate of the grantee himself. And so it was held in *Nichol's Case*, in (n) Plow. Com. fol. 483, that if a man leases lands to a man for life, and if the lessor dies without heir of his body, that then the lessee shall have the land to him and to his heirs: in that case if lessee for life dies, and then the lessor dies without heir of his body, the heir of the lessee shall not have the land, as it was held clearly *causa qua supra*.

And so the law is clear, as it is commonly agreed in our books, if two men (o) exchange lands in fee simple, or fee tail, if both the parties die before the exchange be executed of each part, the exchange is void; for if the heirs should enter, they would be in as purchasers by force of the words, which were words of limitation of the estate, and not of purchase. And upon the same reason is *Brett's and Rig-*

(k) Br. "Attornment," 55; Br. "Disseisin and Disseisor," 61.

(l) Co. Litt. 309 a; 1 Co. 155 b.

(m) 2 Co. 36 b; 1 Co. 95 b, 104 a; Mo. 84.

(n) Plowd. 481 a b, 482 a.

(o) Co. Litt. 50 b, 51 b; 45 E. 3, "Exchange," 10; 1 Roll. 814; Perk. s. 284; 1 Co. 98 b; Jenk. Cent. 249; 3 Wils. 489, 490, &c.

den's Case, adjudged, in Plow. Com. fol. 342, a stronger case than this case is. For a (p) man devised lands to another and to his heirs, and the devisee died in the life of the devisor, and then the devisor died, and it was adjudged that the heir should not take by the devise, for in that case the heirs are not named as words of purchase, but only to express and limit the estate which the devisee should have, for without the word heirs, the devisee could not have the fee simple; and the heirs are named only to convey the land in fee simple, and not to make any other to be purchaser than the first devisee. So in our case the heirs male of the body of E. S. are named only to give E. S. an estate tail, and not to make any other purchaser than E. S. only, and without those words he could not have had an estate tail; and therefore the uncle in our case cannot claim the land as a mere purchaser, but if he takes it in any sort he shall take it in nature and course of a descent, and therefore *quacunq. via data* the uncle cannot have the land; and if he take it in nature and course of a descent (for as a purchaser he cannot take), then the elder son shall enter upon him, and so *quacunq. via data* the son of the elder son ought to have the land. And therefore to conclude; first, no execution could be sued against the issue in tail, because no execution was sued in the life of Edward Shelley; secondly, admitting execution might have been sued against the issue in tail, and that execution was requisite to be had in the life of E. Shelley, inasmuch as the lands were in lease for years, that the reversion was immediately vested in the recoveror by the judgment; thirdly, admitting execution might be sued against the issue in tail, and that the recovery was not executed till after the death of Edward Shelley: yet, first, forasmuch as it was impossible by the act of God that execution should be sued in the life of E. S.; secondly, that the indentures guide the use, and direct it to the heirs male of the body of E. S. by words of limitation; thirdly, that the use and estate do not commence originally in the uncle as a mere purchaser, but first vested in the uncle by force of the indentures made by E. S., and the recovery had against him, and might have vested in E. S., and if it had been vested in E. S., then without doubt Richard Shelley had taken by

(p) Plowd. 345 a; 1 Co. 155 b; Mo. 353; 53; 1 Jones, 59; Carter, 4; 1 Roll. Rep. Swinb. 29, 109; Cro. Eliz. 423; 2 Sid. 253; 2 Roll. Rep. 484; Palm. 556.

descent; fourthly, that the estate is conveyed by way of limitation of use, which is always directed by the intent of the parties; fifthly, that it would be absurd and mischievous to adjudge the whole inheritance to be at the disposal of the recoverors or of the sheriff, who never were trusted; and lastly (q), that Richard the uncle ought either to claim in nature or course of descent; and then no question but the entry of the defendant was lawful, or otherwise merely by purchase, which by the rules of law, and for the reasons aforesaid he cannot: and therefore they concluded, that the entry of Henry Shelley, the defendant, was lawful, and that judgment ought to be given against the plaintiff, that he should take nothing by his bill.

After the said case had been openly and at large argued on three several days by the counsel of each side in the King's Bench, the Queen hearing of it (for such was the rareness and difficulty of the case being of importance that it was generally known), of her gracious disposition, to prevent long, tedious and chargeable suits between parties so near in blood, which would be the ruin of both, being gentlemen of a good and ancient family, directed her gracious letters to Sir Thomas Bromley, Knight, Lord Chancellor of England, who was of great and profound knowledge and judgment in the law, thereby requiring him to assemble all the Justices of England before him, and upon conference had between themselves touching the said questions, to give their resolutions and judgments thereof; and thereupon the Lord Chancellor, in Easter Term in the 23rd year of her reign, called before him, at his house called York House, Sir Christopher Wray, Knight, Lord Chief Justice of England, and all his companions, Justices of the Queen's Bench; Sir James Dyer, Knight, Lord Chief Justice of the Court of Common Pleas, and all his companions, Justices of the same Court; and Sir Roger Manwood, Knight, Lord Chief Baron of the Exchequer, and the Barons of the Exchequer before whom the questions aforesaid were moved and shortly argued by Fenner, Serjeant, on the plaintiff's part, and by one on the defendant's part. At which time the Lord Chancellor was of opinion for the defendant, and openly declared his opinion before all the Justices, that upon the third question the law was for the defendant, and therefore

the defendant's entry upon the uncle was lawful; but the said questions were not resolved at that time, the said Justices desiring time to consider of the questions. And eight or nine days after in the same term, all the said Justices and Barons met together in Serjeants' Inn, in Fleet Street, for the resolution of the said case, and there the case was again shortly argued by them; after which arguments the Justices at that time did confer among themselves, and took further time to consider of the said questions in the next vacation till the beginning of Trinity Term then next following; and accordingly in the beginning of Trinity Term, after great study and consideration of the said record of the special verdict, all the said Justices and Barons met again in Serjeants' Inn, in Fleet Street, at which time, upon conference amongst themselves, all the Justices of England, the Lord Chief Baron and the Barons of the Exchequer, except one of the Puisne Justices of the Court of Common Pleas, agreed that the defendant's entry upon the said Richard the uncle was lawful: and four or five days after their last meeting, one of the defendant's counsel came to the bar in the Queen's Bench, and moved the Justices to know their resolutions in the said case; for their resolution was not before known to the defendant nor to his counsel. And Sir Christopher Wray, Knight, Lord Chief Justice, answered, that they were resolved, and thereupon asked, the plaintiff's counsel being then at the bar, if they could say any more on the plaintiff's part; who answered, that they had said as much as they could: and likewise asked the defendant's counsel if they had any new matter to say for the defendant, who said no. And then the said Chief Justice gave judgment, that the plaintiff should take nothing by his bill; and because the counsel of both sides, who were present, were desirous to know upon which of the said points their resolution did depend, the said Chief Justice openly declared that as to the first point, the better and greater part of all the Justices and Barons held that (r) execution might be sued against the issue in tail, because the right of the estate tail was bound by the judgment against the tenant in tail, and the judgment over to have in value, and that in

(r) Co. Litt. 361; Mo. 141; 1 Co. 94 a b; 55 b; 1 And. 70; 1 Jones, 10; Jenk. Cent. Dy. 374, pl. 15; 376, pl. 26; 3 Keb. 699; 249; 3 Ed. 4, 7.
10 Co. 38 a; 2 Sid. 99; 2 Roll. 396; Plowd.

favour of common recoveries, which are the common assurances of the land. And as to the (s) second point, they were all agreed, that the reversion was not in the recoverors immediately by the judgment: but he said that all the Justices of England and Barons of the Exchequer, except one of the Justices of the Common Pleas, were agreed as to the third point. That the uncle was in, in course and nature of a (t) descent, although he should not have his age, nor be in ward, &c.; first, because the original act, viz. the recovery, out of which all the uses and estates had their essence, was had in the life of Edward Shelley, to which the execution after had a (u) retrospect; secondly, because the use and possession might have vested in Edward Shelley, if execution had been sued in his life; thirdly, the recoverors by their entry, nor the sheriff by doing of execution, could not make whom they pleased inherit; fourthly, because the uncle claimed the use by force of the recovery, and of the indentures by words of limitation, and not of purchase. These were, as the Chief Justice said, the principal reasons of their judgment. And it was resolved by them all, that the recovery, notwithstanding the death of Edward Shelley in the morning between the hours of five and six on the same (x) day, was good enough. And so this case was resolved by Sir Thomas Bromley, Knight, Lord Chancellor of England; Sir Christopher Wray, Knight, Lord Chief Justice of England; Sir James Dyer, Knight, Lord Chief Justice of the Court of Common Pleas; Sir Roger Manwood, Knight, Lord Chief Baron of the Exchequer; Sir Thomas Gawdy, Knight, one of the Justices of Her Highness's Bench; and by all the Justices of the Queen's Bench, and by all the Justices, except one, of the Common Pleas, and by all the Barons of the Exchequer,—that the defendant's right was good, and his entry lawful, and judgment was given accordingly. See this case cited Rep. Q. A. 183; Lucas, 120, 421, 425.

- (s) 1 Co. 94 a, b, 97 a; Mo. 141; 1 Roll. 2 Leon. 21; 1 Jones, 59; 1 And. 70; Jenk. 270; Jenk. Cent. 249; Kel. 108 b; 2 Inst. Cent. 249.
 323. (u) 7 Co. 38 a.
 (t) Mo. 140, 141; 1 Co. 94 b; 2 Co. 93 a; (x) Cro. Eliz. 168; 1 Sid. 229; Palm. 3 Co. 62 a; 8 Co. 76 a; 1 Co. 155 b, 156 a; 312; Dall. 17, pl. 3.

There is no rule which has been adhered to more inflexibly, than that which is termed the rule in *Shelley's Case*, viz. *that when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, in such cases "the heirs" are words of limitation of the estate, and not words of purchase* (ante, p. 474); that is to say, in the first case an estate in fee, in the second case an estate tail will vest in the ancestor, and upon his death his heirs will take not as purchasers under the gift or conveyance, but as heirs of their ancestor by descent. In the absence of the rule, the ancestor would only take an estate of freehold with a contingent remainder to his heirs or issue.

Although termed the rule in *Shelley's Case*, it is of much greater antiquity, and it will be observed, that in that case no question arose upon it, for the decision of the Court; but it is only stated in the arguments, though in such precise and clear terms, that it has from thence derived its name though not its origin.

It has been supposed by some that the rule is of feudal origin, and was introduced to prevent frauds upon tenure, for if the heirs or heirs of the body of the ancestor had been held to take by purchase, they would not upon the death of the ancestor have been liable to the burdens imposed upon a descent, or the lord or donor might be prejudiced by the loss of wardship, marriage and other fruits of tenure. By some it has been said, that the rule had its origin from "the prejudice that might happen to the heirs themselves, by the loss of the remainder, if the ancestor should do anything to forfeit or determine his estate for life after the determination of the intermediate estate; for they, not being capable of taking such remainder when such preceding estates ended, could never after lay claim to it; and so an unwary ancestor might defeat his heir of the purchase: or lastly, from the conformity or parity of reason they bear to a limitation to A. and his heirs, or heirs male or female of his body; for as the one gives an estate for life by implication, and more, so the other gives him the same in express words, and more; and *expressio eorum quæ tacitè insunt nihil operatur*. And the interposition of another estate between them, only breaks the order of the limitation, not the operation of the words; which being the same in both cases, ought to have the same operation and construction." *Fearne, Cont. Rem.* 83—85.

Mr. Justice Blackstone, in *Perrin v. Blake*, was rather inclined to believe that the rule was established to prevent the inheritance from being in abeyance; and that one principal foundation of it was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance. Another foundation, he said, might be, and was probably laid in a principle diametri-

cally opposite to the genius of feudal institutions ; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce, one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. The learned Judge refers to what he believes to be the earliest case in which the principle was established (M. 18 Ed. 2, fol. 577), for the purpose of facilitating the alienation of the land by charging it with the debts of the ancestor. Mr. Hargreave considered the rule as one branch of a policy of law adopted to prevent the annexation to a real descent, of the qualities and properties of a purchase ; so that in effect the object of the rule was that no man should raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. 1 Harg. Law Tracts, 572 ; Fearn, 85, 86.

The origin of the rule, however plausible may be the suggestions of learned men upon the subject, is lost in obscurity ; but whatever that may be, or whether its continuance can be justified upon any rational grounds, it still remains as firmly rooted in English jurisprudence as any other rule whose origin is clear and whose utility is manifest.

The rule in *Shelley's Case*, the application of which it is now proposed to consider, is always termed a rule of law, and not a rule of construction.

In the first place it may be mentioned, that the rule is equally applicable to limitations of the legal estate, limitations of use, and limitations of trust, and extends as well to copyhold as to freehold lands and tenements, and even to lands held for a life or lives, and subject to a quasi entail. 1 Prest. Est. 289.

Limitations must be in the same Instrument.

The rule will not be applicable unless the limitation to the ancestor and his heirs be in the same instrument. Thus if a person by deed give an estate to his son for life, and by his will devise the same estate to the heirs male of his body, the son will take only an estate for life, with remainder in tail, by purchase, to the heirs male of his body. *Doe d. Fonnereau v. Fonnereau*, Dougl. 470 ; and see *Moore v. Parker*, Ld. Raym. 37 ; *S. C. Skinn.* 558.

So where A. was tenant for life, with remainder to the right heirs of B., A. afterwards granted his estate to B., so that he became tenant for the life of A., it was held that the life estate did not coalesce with the remainder to the right heirs of B. ; for it was not conveyed by the grant of the first grantor, but by the act of another person after the grant (29 Ed. 3, cited 2 Leon. 7 ; 1 Ld. Raym. 37 ; and see *Fearn*, Cont. Rem. 71) ; but a will and a schedule to it are considered as one instrument (*Hayes d. Foorde v.*

Foorde, 2 Wm. Black. 698); and it would seem that the same principle would be applicable to a will and codicil, or several codicils. 2 Jarm. Wills, 275.

A question has been raised whether a deed in execution of a power is not to be considered as part of the instrument conferring the power, so as to make limitations in the former and latter coalesce according to the rule. Suppose, for instance, under a deed there be a limitation to A. for life, with remainder, after his decease, to such uses as B. shall appoint, and B. afterwards in A.'s life appoints to the use of the right heirs of A., will the rule be applicable? Mr. Fearné thought that it would, upon the ground that the limitation of a use, under an execution of a power of appointment contained in a conveyance to uses, in general operates as a use created by, and arising under, that conveyance itself; and is therefore the subject of the same construction, so far as the time of its taking effect admits, as it would have been if expressly specified and ascertained in the original deed itself. Fearné, Cont. Rem. 74. The case put has not, however, received a judicial determination, and the conclusion arrived at by Mr. Fearné has been doubted by several eminent authors. See 1 Prest. Est. 324; Co. Litt. 299 b, Butl. n.; 2 Jarm. 275.

Limitations must be both Legal or both Equitable.

As we have before shown, the rule is applicable as well where the limitations to the ancestor and his heirs are equitable as where they are legal; but where one limitation is legal and the other equitable, the rule does not apply, and the heirs will take as purchasers. Thus if property was vested in trustees upon trust to receive rents during the life of A., and after making certain payments, such as rates, taxes, repairs and expenses, to pay the residue to A. for life, and after the death of A. there was a gift to the heirs male of his body, A. would only take a life estate. See *Shapland v. Smith*, 1 Bro. C. C. 74; *Jones v. Lord Say and Sele*, 8 Vin. Abr. 262, pl. 19; *Silvester d. Law v. Wilson*, 2 T. R. 444; *Doe v. Ironmonger*, 3 East, 533; *Curtis v. Price*, 12 Ves. 89; *Wykham v. Wykham*, 18 Ves. 395; *Tenny d. Gibbs v. Moody*, 3 Bing. 3; *Biscoe v. Perkins*, 1 V. & B. 485; *Adams v. Adams*, 6 Q. B. 860.

In considering therefore whether the rule is applicable or not, the subject which we have before discussed, as to what estates trustees take, becomes very important. See note to *Chudleigh's Case*, pp. 267—273, ante.

Where both the limitations are legal, it seems to be the better opinion, that the rule will be applicable, although a trust may attach to one of the limitations. Thus in *Douglas v. Congreve*, 1 Beav. 59, where a testator

devised real and personal estate to the plaintiff, a married woman, for her life, for her *independent use and benefit*, and after her decease to her husband for life, with remainder to the use of the heirs of her body in tail, it was held by Lord Langdale, M. R., affirming the certificate of the Court of Common Pleas (4 Bing. N. C. 1), that, subject to the intervening life interest in her husband, the plaintiff took an estate tail in the realty and an absolute interest in the personalty. "It has been argued," said his Lordship, "that although the legal estate is given to the plaintiff, yet there is a direction that she shall hold it for her independent use and benefit, which she cannot do without the intervention of this Court, which converts her husband into a trustee for her; so that, in effect, she has only an equitable estate during her husband's life; and, as that cannot coalesce with the legal estate in remainder, the rule in *Shelley's Case* does not apply. It is, however, to be observed, that the *legal estate* is vested in the wife; that the power which the law gives to the husband over the real estate of his wife does not alter the nature or quality of that estate, and that it is only with the marital power of the husband that this Court interferes, to secure to the wife the independent use of her property. In one sense, no doubt, the husband is, or may be made, a trustee for the wife, but not so as to alter the legal estate given to her by the testator; and, on the whole, I am of opinion, that, subject to the prior life estate, the plaintiff is entitled to an estate tail in the lands in question, and consequently that the Judge's certificate must be confirmed." See also 1 Prest. Est. 311; *sed vide* Fearn, Cont. Rem. 35.

What is a sufficient Estate of Freehold in the Ancestor.

Although the contrary opinion was held by Rolle (2 Roll. Abr. 418), it is clear that the rule is applicable, although the estate of freehold in the ancestor is such as may be determined in his life; as where an estate for life is given to two persons during the life of a third (Perk. s. 337), or to two persons during their joint lives. Thus in *Merrill v. Rumsey*, 1 Keb. 888; *S. C. T. Raym.* 126, an estate was limited to husband and wife *during their joint lives*; and after the decease of either of them, remainder to the heirs of the body of the wife begotten by the husband, remainder to the wife for life. Upon a dispute between the children and the wife, after the death of the husband, whether this was an estate tail in the wife or a contingent remainder in the children, Keeling conceived it an estate tail executed *sub modo*, not presently by severance of the jointure, as it would be by a several conveyance, but upon the death of him whose life kept the estates asunder, they were united and executed; and the Court agreed there was no con-

tingency, either in estate or person, and that an estate to a woman *durante viduitate*, remainder to the heirs of her body, is an estate tail in the woman. See Fearn, Cont. Rem. 31.

And the possibility that the estate *durante viduitate* may terminate in the life of the widow, and before there can be an heir, is no objection. *Curtis v. Price*, 12 Ves. 99; *Doe d. James v. Hallett*, 1 Mau. & Sel. 124.

The rule will be applicable although the estate of freehold in the ancestor arise by implication. Thus in the leading case of *Pybus v. Mitford*, 1 Vent. 372, A., seised in fee, covenanted to stand seised to the use of his heirs male begotten or to be begotten on the body of his second wife. It was held by Hale, C. B., and two other Judges, that A. took an estate for his own life by implication (the use during his own life not being disposed of); and that the subsequent limitation to his heirs male was executed on the estate for life which he had by implication, and created an estate tail in A. See also *Hayes d. Foords v. Foords*, 2 Wm. Black. 698; *Coape v. Arnold*, 2 Sm. & Giff. 311, affirmed by the Lord Chancellor on other grounds. W. R. 1854-5, p. 187.

The rule will not operate where the limitation after the estate of freehold is to the heirs of the body of the ancestor and of another person, who *may have heirs of the body common to both*. Thus if there be a limitation to the wife for life, with remainder to the heirs to be begotten *on the body of the wife* by the husband, the heirs of the body will take a contingent estate tail by purchase (See *Gossage v. Tayler*, Sty. 325; *Frogmorton d. Robinson v. Wharrey*, 3 Wils. 125, 144; 2 Wm. Black. 728); and if in the case put the wife died in the lifetime of the husband (inasmuch as the heirs could not be ascertained until his death, according to the maxim "*Nemo est hæres viventis*;" and as a remainder must take effect, if at all, immediately upon the determination of the particular estate), the contingent remainder to the heirs of the body of the wife could not take effect (*Lane v. Pannell*, 1 Roll. Rep. 238, 317, 438; *Anon.*, Dy. 99 b). Where, however, there is a limitation to a person for life with remainder to the heirs of the body of that person and some other person of the same sex, or if of a different sex, being prohibited by law from intermarriage with each other, the rule will only operate as to one moiety. Thus if a father devised land to his son A. for life, with remainder to the heirs of the body of A. and his other son B., A. would, according to the rule, become tenant in tail of one moiety, and the heir of the body of B. would take the other moiety as purchaser. Fearn, Cont. Rem. 35.

Where, however, there is a limitation, either to a husband and wife or to persons capable of becoming such, jointly (Fearn, Cont. Rem. 35; 1 Prest. Est. 336; *Roe d. Aistrop v. Aistrop*, 2 Wm. Black. 1228) or successively (*Stephens v. Brittridge*, 1 Lev. 36; T. Raym. 36; 1 Prest. Est. 336), for

life, with remainder to the heirs of their bodies, the heirs will take by descent. Though it must be remembered that where the ancestors are husband and wife they will be tenants by entireties. See note to *Morley v. Bird*, post.

It will, however, be held, where the wife takes a previous estate of freehold, that her heirs are exclusively referred to under a limitation to the heirs of *her body by the husband begotten*, and, consequently, by the operation of the rule, which requires an estate of freehold in the ancestor, with a remainder to the heirs of the body of the *same* person, she will take an estate tail. See *Alpass v. Watkins*, 8 T. R. 516; in which case in a marriage settlement there was a limitation to the husband for life, remainder to the intended wife for life, with remainder to the heirs of the body of the wife by the intended husband to be begotten, and of their heirs and assigns for ever. It was held by the Court of King's Bench that the wife took an estate tail. See also *Morris v. Ward*, cited *Ib.* 518.

Upon the same principle, where, by marriage settlement, a man limited estates to the use of himself and his intended wife for their lives and the life of the survivor, with remainder to the use of the heirs of the body of the intended husband, *on the body of the intended wife to be begotten*, it was held by the Court of King's Bench that an estate in special tail vested in the father only. *Roe d. Aistrop v. Aistrop*, 2 Wm. Black. 1228.

So forcibly has the rule been applied, that various circumstances, from which it might be implied that there was no intention of giving anything but an estate of freehold to the ancestor, have been invariably disregarded. Thus where, between the freehold given to the ancestor and the limitation to the heirs of his body, a limitation to trustees to preserve contingent remainders has been interposed, it has, nevertheless, been held, that the ancestor took an estate tail (*Sayer v. Masterman*, Amb. 344; *Coulson v. Coulson*, 2 Stra. 1125; *Hodgson v. Ambrose*, Dougl. 337; 3 Bro. P. C. Toml. Ed. 416; *Measure v. Gee*, 5 B. & Ald. 910); although it might reasonably be presumed to have been the intention of the settlor or testator by the limitation to trustees, to have preserved what he must have considered to have been the contingent interest that the heirs of the body would take by purchase. Upon the same principle, a declaration that a person to whom the freehold is given shall have it without impeachment of waste (*Papillon v. Voice*, 2 P. Wms. 471; *Jones v. Morgan*, 1 Bro. C. C. 206; *Denn d. Webb v. Puckey*, 5 T. R. 299; *Frank v. Stovin*, 3 East, 548; *Bennett v. Earl of Tankerville*, 19 Ves. 170), or with a power of jointuring (*Broughton v. Langley*, 2 Ld. Raym. 873; 2 Salk. 679; *King v. Melling*, 2 Lev. 58; 1 Vent. 225; 3 Keb. 42; and see *Right d. Phillipps v. Smith*, 12 East, 455), will not prevent a subsequent limitation to the heirs

of the body from coalescing with the freehold. See also *Montgomery v. Montgomery*, 3 J. & L. 47, 52.

Even an express declaration that the estate of the ancestor shall not extend beyond the freehold interest first given to him, will not prevent its junction with a subsequent limitation to his heirs according to the rule. Thus in the well-known case of *Robinson v. Robinson*, 1 Burr. 38, where there was a devise to Lancelot Hicks, "for and during the term of his natural life, *and no longer*;" "and after his decease to such son as he shall have lawfully begotten," taking a particular name, "and for default of such issue," then over. The Court of King's Bench, to which the case had been sent by the Court of Chancery (2 Ves. 225), certified that Lancelot Hicks took an estate in tail male, notwithstanding the express estate devised to him for his life and no longer. This certificate was confirmed in Chancery, and a decree made accordingly (2 Ves. 225), which was afterwards affirmed by the House of Lords, 3 Bro. P. C., Toml. Ed., 180, nom. *Robinson v. Hicks*. Another important and leading case upon the same subject is that of *Perrin v. Blake*, 4 Burr. 2579; 1 Wm. Black. 672; Fearne, C. R. 155; there one John Williams, seised in fee of a plantation in Jamaica, devised in the following words:—"Should my wife be enceinte with a child at any time hereafter (which was not the case), and it be a female, I give and bequeath unto her the sum of 2,000*l.*, &c.; and if it be a male, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. Item, it is my intent and meaning that none of my children should sell or dispose of my estate for *longer time than his life*, and to that intent I give, devise and bequeath all the rest and residue of my estate to my son John Williams and the said infant *for and during the term of their natural lives*, the remainder to my brother-in-law J. G., and his heirs, for and during the lives of my son John Williams and the said infant, the remainder to the heirs of the body of my said sons John Williams and the said infant lawfully begotten, or to be begotten, the remainder to my daughters, &c. No other son was born, and the question was, what estate John Williams took under the will. The Court of Queen's Bench, comprising Lord Mansfield, Aston, J., Willes, J. (Yates, J., dissentiente), held, that J. Williams took only an estate for life. This decision was, however, afterwards reversed by the majority of the Judges in the Exchequer Chamber, who held that John Williams took an estate tail. An appeal to the House of Lords was compromised, and the plaintiff obtained leave to withdraw his writ of error. See also *Hayes d. Foorde v. Foorde*, 2 W. Black. 698; *Thong v. Bedford*, 1 Bro. C. C. 313; *Roe d. Thong v. Bedford*, 4 Mau. & Sel. 362.

Effect of Words of Limitation superadded to the Words "Heirs of the Body."

It is now clearly established, that where words are superadded, not inconsistent with the previous limitation to "the heirs of the body," such words will not prevent the operation of the rule in *Shelley's Case* (where there has been a previous limitation of the freehold to the ancestor), by converting the words "heirs of the body" into words of purchase. Where, therefore (a previous freehold having been given to the ancestor), the words "heirs of his body," or "heirs male of the body," were followed by the following expressions, "and the heirs male of such issue male" (*Burnet v. Coby*, 1 Barn. K. B. 367; *Legatt v. Sewell*, 2 Vern. 551; S. C. 1 Eq. Ca. Abr. 394, pl. 7; 1 P. Wms. 87), "and their heirs" (*Wright v. Pearson*, 1 Ed. 119; Amb. 358; *Alpass v. Watkins*, 8 T. R. 516), "and their heirs for ever" (*Denn d. Geering v. Shenton*, Cowp. 410), "and his heirs for ever" (*Goodright d. Lisle v. Pullyn*, 2 Ld. Raym. 1437; 2 Stra. 729), "his, her and their heirs and assigns for ever" (*Measure v. Gee*, 5 B. & Ald. 910), "their heirs, executors, administrators and assigns for ever" (*Kinch v. Ward*, 2 S. & S. 409), "and the heirs and assigns of such male issue for ever" (*Nash v. Coates*, 3 B. & Ad. 839); it was held, that the ancestor took an estate tail. And in such cases the circumstance that trustees to preserve contingent remainders are interposed (*Wright v. Pearson*, 1 Eden, 119), that the heirs of the body are directed to assume the testator's name (*Nash v. Nash*, 3 B. & Ad. 839), that the devise over is expressly made to depend on the ancestor leaving no issue "living at his death" (*Wright v. Pearson*, 1 Eden, 119), that the limitation to the heirs male of the tenant for life is restricted to such "who shall live to attain the age of twenty-one years, their heirs and assigns for ever" (*Toller v. Attwood*, 15 Q. B. 929), or that there is a declaration that the heirs shall take by purchase (Harg. Law Tracts, 562), will not vary the rule.

Where, after a limitation to the *heirs of the body* of the ancestor to whom a previous freehold interest is given, words are added modifying the usual course of descent of an estate tail, by giving it to the issue jointly, after many conflicting decisions it has been at length established that such superadded words ought to be rejected as repugnant to the estate, which by affixing a proper technical meaning to the previous limitations, and the operation of the rule in *Shelley's Case*, would be created, viz. an estate tail. Thus where, after a previous life interest to the ancestor and "the heirs of his body," there are added the words, "to take as tenants in common and not as joint tenants" (*Bennett v. Earl of Tankerville*, 19 Ves. 170; *Doe d. Candler v. Smith*, 7 T. R. 531), "whether sons or daughters, as tenants in common and not

as joint tenants" (*Pierson v. Vickers*, 5 East, 548), "to be equally divided amongst them share and share alike" (*Doe d. Atkinson v. Featherstone*, 1 B. & Ad. 944), it has been held that the ancestor took an estate tail.

The leading case upon this subject is that of *Jesson v. Wright*, 2 Bligh, 1. There the testator gave certain hereditaments to William an illegitimate son of his sister, to hold to him *for and during the term of his natural life*, he keeping the dwelling-houses, &c. in repair; and after his decease he gave the same hereditaments unto *the heirs of the body* of the said William, *in such shares and proportions*, as he the said William should by deed or will appoint, and for want of such appointment, then to the *heirs of the body* of the said William lawfully issuing, *share and share alike as tenants in common*; and if but *one child*, the whole to *such only child*, and for *want of such issue*, to his own right heirs. The Court of King's Bench held, that William took only for life, with remainder to his children for life (5 Mau. & Sel. 95). Lord Ellenborough was of opinion, that the words, "heirs of the body," which, in their ordinary and natural sense, import an estate tail, meant in this instance children only. He relied upon the power of appointment, and the gift in default of appointment as tenants in common, and considered, that the testator had by his own construction of "heirs of the body," described children, and that the devise over meant, for want of children. Mr. Justice Bayley was entirely of the same opinion, and he went much further; he held, that in the clause which contained a power of appointment, it was impossible that the testator could have used the words as words of limitation; they gave a new estate to the objects of that power as purchasers. "If so," he added, "we have established the meaning of the words 'heirs of the body' in one clause. The next clause was in default of appointment to the heirs of the body of William. Had the testator stopped there, the presumption would have been, that he, after having used the words 'heirs of the body' when they could not have been intended as words of limitation, was again using them in the same sense, that is, not to enlarge the former estate, but to create estates by purchase (Sugd. Prop. 250). Upon appeal to the House of Lords, the judgment of the Court of King's Bench was reversed, and it was held that William took an estate tail. On moving the judgment of the House, Lord Chancellor Eldon observed, "It is definitively settled as a rule of law, that where there is a particular, and a general or paramount intent, the latter shall prevail, and Courts are bound to give effect to the paramount intent. The decision in the Court below has proceeded upon the notion, that no such paramount intent is to be found in the will. If we stop after the words 'heirs of the body of the said William,' notwithstanding the testator had be-

fore given an estate expressly to William for his natural life only, it is clear, that by the effect of these following words, he would be tenant in tail; and in order to cut down this estate tail, it is absolutely necessary that a particular intent should be found to control and alter it as clear as the general intent here expressed. The words 'heirs of the body' will indeed yield to a clear particular intent, that the estate should be only for life, and that may be from the effect of superadded words, or any expressions showing the particular intent of the testator; but that must be clearly intelligible and unequivocal. 'Heirs of the body,' mean one person at any given time, but they comprehend all the posterity of the donee in succession. William, therefore, could not strictly and technically appoint to heirs of the body." With regard to the construction of the limitation, over in default of appointment, his Lordship observed, "Children are included, undoubtedly, in 'heirs of the body'; and if there had been but one child, he would have been heir of the body, and his issue would have been heirs of the body; but because children are included in the words 'heirs of the body,' it does not follow, that 'heirs of the body' must mean only children, where you can find upon the will a more general intent comprehending more objects." As to the words "for want of such issue," his Lordship added, "If the words 'children and child' are so to be considered, as merely within the meaning of the words 'heirs of the body,' which words comprehend them and other objects of the testator's bounty (and I do not see what right I have to restrict the meaning of the word 'issue'), there is an end of the question. I do not go through the cases; that of *Doe v. Goff*, is difficult to reconcile with this case—I do not say impossible; but that case is as difficult to be reconciled with other cases. Upon the whole I think it is clear, that the testator intended that all the issue of William should fail, before the estate should go over according to the final limitation." Lord Redesdale observed, "The rule is, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise. In many cases,—in all, I believe, except *Doe v. Goff* (11 East, 668), it has been held, that the words, 'tenants in common,' do not overrule the legal sense of words of settled meaning. In other cases, a similar power of appointment has been held not to overrule the meaning and effect of similar words. It has been argued, that heirs of the body cannot take as tenants in common; but it does not follow that the testator did not intend that heirs of the body should take because they cannot take in the mode prescribed. This only follows, that having given to heirs of the body, he could not modify that gift in the two different ways which he desired; and the words of modification are to be rejected. Those who decide upon such cases ought not to rely on petty distinctions, which only mislead parties,

but look to the words used in the will. The words 'for want of such issue,' are far from being sufficient to overrule the words 'heirs of the body.' They have almost constantly been construed to mean an indefinite failure of issue; and of themselves, have frequently been held to give an estate tail. In this case, the words, 'such issue,' cannot be construed children, except by referring to the words 'heirs of the body,' and in referring to those words they show another intent. The defendants in error interpret 'heirs of the body' to mean children only, and then they say, the limitation over is in default of children; but I see no ground to restrict the words 'heirs of the body' to mean children in this will. . . . It is impossible to decide this case without holding *Doe v. Goff* is not law."

It should be here mentioned, that Lord St. Leonards does not appear to have considered that *Doe v. Goff* has been overruled. See *Montgomery v. Montgomery*, 3 J. & L. 53, 54, 55, 60.

In the case of *Doe d. Bosnall v. Harvey*, 4 Barn. & Cress. 610, the testator being seized in fee of lands in gavelkind, devised all his real estate unto his nephew T. C., for and during the term of his natural life, and from and after the determination of that estate, to trustees to preserve contingent remainders, and from and after the decease of T. C., to and amongst all and every the heirs of the body of the said T. C., as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint tenants, and for default of such issue to trustees for a term of 500 years, upon trust that they should as soon as might be, after the decease of T. C., in case he should die without issue of his body lawfully begotten, raise a sum of money to be applied to the maintenance of his niece, and after the determination of the said term of 500 years, he devised the sum to his nephews T. C. and C. C., for and during their respective natural lives, to take as tenants in common, and not as joint tenants, and from and after their respective deceases unto and amongst all and every the heirs of the respective bodies of the said T. C. and C. C., as well female as male, lawfully begotten or to be begotten, such heirs to take as tenants in common, and not as joint tenants, and in default of such issue to his own right heirs for ever. It was held by the Court of King's Bench, upon the authority of *Jesson v. Wright*, that T. C. took an estate tail. "It appears," said Abbott, C. J., "to be clearly established, that a particular intent expressed in a will must give way to a general intent. It is also a clearly established rule of law, that where there is a gift by will of an estate of freehold to a particular individual, with remainder to the *heirs of his body*, the latter words are to be construed as showing an intention on the part of the testator to include all the heirs of the body of the first taker, unless from other words of the will it clearly and unequivocally appears that those words are used to designate

particular individuals. Now, in this case it manifestly appears, by the devise to the heirs of the body of T. C., to have been the intention of the testator that his estate should remain in the family of T. C., so long as that family should exist. The only way in which that intention can be effectuated is to construe the words 'heirs of the body' to be words of limitation."

The cases, therefore, of *Doe d. Long v. Laming*, 2 Burr. 1100; *Doe d. Hallen v. Ironmonger*, 3 East, 533; *Doe d. Strong v. Goff*, 11 East, 668; and *Crumph v. Woolley v. Norwood*, 7 Taunt. 362; *S. C.* 2 Marsh. 161; and *Gretton v. Haward*, 6 Taunt. 94; *S. C.* 2 Marsh. 9 (in which superadded words similar to those in *Jesson v. Wright*, and that class of cases, were held to give the ancestor only an estate for life with remainder to his children as purchasers), must be considered as overruled. *Sed vide Wilcox v. Bellairs*, Hayes, Limit. 5; *Right d. Shortridge v. Creber*, 5 Barn. & Cress. 866.

Where, however, the course of descent is altered by the superadded words the rule in *Shelley's Case* will not be applicable, and the heirs will take as purchasers; as in the case put by Anderson in his argument, in the principal case (ante, p. 454), that if there were a limitation to the use of a man for life, and after his decease to the use of his heirs, and of their heirs female of their bodies, the words "his heirs" are words of purchase; for if it were not so the subsequent words, "and of their heirs female of their bodies," would be void. See *Doe d. Bosnall v. Harvey*, 4 Barn. & Cress. 610.

So where the words superadded to the limitation to "the heirs of the body," show a *clear and unequivocal intention* of the testator to give to the words "heirs of the body" some other than their ordinary signification as that of *first and other sons, children or sons*, they may be construed as words of purchase. *Poole v. Poole*, 1 B. & P. 620. Thus, for instance, in the case of *Goodtitle d. Sweet v. Herring*, 1 East, 264, where the testator devised hereditaments to Margaret Davie and her assigns during her natural life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to *the heirs male of the body of Margaret Davie* to be begotten severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, *the elder of such sons* and the heirs male of his body being always preferred, and to take before the younger of *such son and sons*, and the heirs male of his and their body and bodies, and for want of such issue to the *daughter and daughters* of the body of the said Margaret Davie as tenants in common, and the heirs of their bodies. It was held by the Court of King's Bench, that Margaret Davie took only estate for life and not an estate tail, and that her sons took as purchasers. "The intention," said Lord Kenyon, "is most obvious, to give the first taker only an estate for life; but if that

intention could not be carried into effect, without shaking a positive rule of law, I should certainly bow to the decisions. The case of *Colson v. Colson* (2 Atk. 246), went on that ground; and so afterwards did *Perrin v. Blake* (4 Burr. 2581), in the Exchequer Chamber; where the Judges thought, that after the rule of law in *Shelley's Case* had governed so many subsequent decisions, however imperfect in itself as a rule for construing the intention of a testator, it was necessary to abide by it. That rule, however, is only established to the extent in which it is to be found in *Shelley's Case*, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately in any part of the same instrument, an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate tail. *But it has never been decided that those words might not be otherwise explained in the will by the testator himself.* They were so explained in *Lowe v. Davies* (2 Ld. Raym. 1561). There the question was whether the words 'heirs lawfully to be begotten' could not be explained, by the subsequent words, to mean heirs of a certain description. In other words, whether the testator could not say by heirs lawfully begotten. I mean the *first and other sons successively*, &c. of the first taker. Of this there could be no doubt." See also *Lisle v. Gray*, 2 Lev. 223; T. Raym. 278; T. Jones, 114; *Mandeville v. Lackey*, 3 Ridg. P. C. 352; *Doe d. Woodall v. Woodall*, 3 C. B. 349; *Green v. Green*, 3 De G. & Sm. 480.

The before-mentioned cases may be well contrasted with *Jones v. Morgan*, 1 Bro. C. C. 206, where the rule in *Shelley's Case* was held to operate, the superadded words not being considered inconsistent with the previous limitations to the heirs male of the body of the ancestor. There an estate was limited to the use of A. for life, without impeachment of waste, and after his decease, to the use of the *heirs male of his body, severally, respectively, and in remainder, the one after the other, as they and every of them shall be in seniority of age and priority of birth*; it was held by Lord Thurlow, C., that A. took an estate tail. "By all the cases," said his Lordship, "where the estate is so given that, after the limitation to the first taker, it is to go to every person who can claim as heir to the first taker, the word 'heirs' must be a word of limitation. All heirs taking as heirs must take by descent. In cases where I can bring it to the point, that the testator by the word 'heirs,' as used in the will, means first, second, third and other sons, then I change the words of the will; but here I think the word '*heirs*' was the very thing he meant."

Again, "heirs of the body" may be construed to mean *children*, so as to make them take by purchase. Thus in *North v. Martin*, 6 Sim. 266, where by marriage settlement estates were limited to the use of the intended husband for life, with remainder to trustees to preserve contingent remain-

ders, remainder to the intended wife for life, and after the decease of the survivor, to the use of the heirs of the body of the intended husband on the body of the intended wife to be begotten, *and their heirs*, and *if more children than one*, equally to be divided among them, to take as tenants in common and not joint tenants, and for default of such issue then over, it was held by Sir L. Shadwell, V. C., that the children took by purchase as tenants in common in fee in remainder. "Here," said his Honor, "there are all the elements of a case which would call upon the Court to decide that the first taker took an estate in tail special. But then there are the words 'and if more children than one,' which must be taken to be interpretative of the words 'heirs of the body.' If those interpretative words had not been used, the husband, notwithstanding the superadded words of limitation, would have taken an estate in tail special. But no case has been cited, nor do I recollect any, in which the words 'heirs of the body' have been held to create an estate tail, where those words of interpretation have been used. If the interpretative words are to be allowed to operate, the effect of the argument founded on the limitation over, for default of such issue, will be done away; for those latter words must be construed to mean 'for default of such children.'" See, however, *Dunk v. Fenner*, 2 Russ. & My. 557.

It must, however, be always borne in mind, that, as a general rule, the first taker will be held to have an estate tail, where the limitation to him for life is followed by one to him and the heirs, or heirs male, of his body, unless the intention appears to be so plainly to the contrary as to be wholly incompatible with an estate tail. Thus after a devise to a feme covert for life for her separate use, with remainder to the heirs of her body in tail, with remainders over, notwithstanding a subsequent declaration that the aforesaid limitations were intended by the testator *to be in strict settlement*, it was held that she took an estate tail, which could not be altered by the subsequent ambiguous expression. *Douglas v. Congreve*, 5 Scott, 223; 4 Bing. N. C. 1; 1 Beav. 59.

The same principle prevailed in *Jack v. Fetherston*, 9 Bligh, 237, where the testator made his will as follows:—"I give, devise and bequeath to W. Fetherston, and to *his heirs male according to their seniority in age*, on their respectively attaining the age of twenty-one years, all my estates real and personal, in lands, houses and tenements not hereinbefore disposed of, the elder son surviving of the said W. Fetherston and the heirs male of his body lawfully begotten always to be preferred to the second or younger son; and in case of the failure of issue male in the said W. Fetherston surviving him, or their dying unmarried and without issue male attaining the age of twenty-one years, then to Theobald Fetherston, brother of the said W. Fetherston, and his heirs male lawfully begotten, on attaining the

age of twenty-one years, the elder to be preferred to the younger; and in case of the death or failure of the issue male of the said Theobald lawfully begotten, and their not attaining the age of twenty-one years, then to my right heirs for ever." It was held by the House of Lords that W. Fetherston took an estate tail. Tindal, C. J., in delivering the unanimous opinion of the Judges, said, "That the words which first occur in the devise, 'I give to W. Fetherston and his heirs male my real estates,' do in a will give to the devisee a clear and unequivocal estate tail. The only question therefore is, whether the words which follow do with *equal clearness and certainty* cut down the estate tail so given to the devisee into an estate for life, and make his sons to take estates tail as purchasers, instead of by limitation. Now applying the rule of limitation laid down by Lord Alvanley in *Poole v. Poole*, 3 Bos. & Pul. 627), and by the judgment in the House of Lords in *Doe d. Jesson v. Wright* (2 Bligh, 1), we do by no means think the subsequent words of the devise show a plain and unequivocal intention to reduce the estate tail to an estate for life; on the contrary, we think them rather more compatible with an explanation, though somewhat incorrect, of the notion which the testator entertained of the course of a descent under a gift in tail."

How far other Words are to be taken as synonymous with "Heirs of the Body," Heirs male of the Body, &c.

The words "son" or "child," in the singular number, are often words of limitation, and synonymous with heirs male or heirs general. When this is the case, and there has been a prior life interest given to the parent, the rule in *Shelley's Case* will be applicable.

An instance has already been given of this in the case of *Robinson v. Robinson* (ante, p. 488), where a devise of real estate to a man for the term of his natural life, and no longer, and after his death to such son as he should have lawfully begotten, was held to give the father an estate tail. So likewise where there was a devise to a person, and if he died not having a son (*Bifield's Case*, cited 1 Vent. 231; *Milliner v. Robinson*, Moore, 682, pl. 939), it was held that the word "son" was a word of limitation, and that consequently, according to the rule in *Shelley's Case*, the devisee took an estate tail. See also *Mellish v. Mellish*, 2 Barn. & Cress. 520; *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87.

Where there is a devise to a particular son, as "to the eldest son," those words will sometimes, though not in general so readily, be considered as words of limitation. See and consider *Doe d. Burrin v. Charlton*, 1 Scott, N. R. 290; *S. C.* 1 Mann. & Gr. 429; *East v. Twyford*, 4 H. L. Cas. 517; overruling *S. C.* 9 Hare, 730, n.; *Lewis v. Puxley*, 16 Mees. & W. 733.

The word "child" is also used as *nomen collectivum*. See *Doe d. Jones v. Davies*, 4 B. & Ad. 43; *Raggett v. Beaty*, 2 Moo. & Pay. 512; *Doe v. Webber*, 1 B. & Ald. 713; *Doe d. Jearrad v. Bannister*, 7 Mees. & W. 292.

In many cases the word "issue" is synonymous with "heirs of the body," it being *nomen collectivum*, and a word of limitation, and, when so construed, the rule in *Shelley's Case* will operate in the same manner as if the words "heirs of the body" had been used. A leading case upon this subject is *King v. Melling*, 1 Vent. 225, 232; 2 Lev. 58, 61; there the testator gave land to his son for his natural life, and after his decease he gave the same to the *issue* of his body lawfully begotten on a second wife, and for want of such issue, to John Melling and his heirs for ever. Provided that the son might make a jointure of all the premises to such second wife, which she might enjoy during her life. Twisden, J., and Rainsford, J., held, that the son took only an estate for life; Hale, C. B., *contrà*, held that he took an estate tail, and his opinion prevailed before the Exchequer Chamber upon appeal. See also *Shaw v. Weigh*, 2 Stra. 798; 1 Eq. Ca. Abr. 184, pl. 28; *Attorney-General v. Bright*, 2 Keen, 57; *Jordan v. Lowe*, 6 Beav. 350.

Effect of Words superadded to the word Issue, &c.

Nor will superadded words, describing issue of the same kind, have the effect of converting issue into words of purchase. Thus in the leading case of *Roe d. Dodson v. Grew*, 2 Wils. 322; Wilm. 272 (which must be considered as overruling *Bachhouse v. Wells*, 1 Eq. Ca. Abr. 184, pl. 27), a testator devised lands to his nephew George Grew for life, and after his decease to the use of the *issue male of his body* lawfully to be begotten, and the heirs male of the body of such issue male; and for want of such issue male to George Dodson in fee. It was held by the Court of Common Pleas, that George Grew took an estate tail. "The intention of the testator," said Wilmot, C. J., "clearly was to give George Grew an estate for life only, but his intention also clearly was that all the sons of George Grew should take in succession. Both these intentions cannot take place; for if the devisee George Grew took only an estate for life, his sons could never have taken, and although it eventually happened that he had no sons, yet we must consider this case as if he had had issue; therefore the Court must put themselves in the place of the testator, and determine as he would have done, if he had been told that both of his intentions in the will, by the rules of law, could not take place, and had been asked which of them he desired should take effect and stand, as both could not, he certainly would have answered, 'that so long as

George Grew had any issue male, that the premises should not go to the lessor of the plaintiff;' and if we balance the two intentions, the weightiest is, that all the sons of George Grew should take in succession; and therefore to enable them to take, George Grew must be adjudged to have been tenant in tail, for the testator's great intention most clearly was that the lands should never go over to the lessor of the plaintiff in remainder, but upon a failure of issue of George Grew." Bathurst, J., observed,—“It is a rule, that where an ancestor takes an estate of freehold, if the word ‘issue’ in a will comes after, it is a word of limitation; where there appears a particular intent and a general intent, the general intent must take place.” See also *Hodgson v. Merest*, 9 Price, 556.

The doctrine, however, of the general and particular intent, which Wilmot, C. J., and the other Judges referred to in *Roe d. Dodson v. Grew*, and which appears to have been first mooted in *Robinson v. Robinson* (1 Burr. 38; 2 Ves. 225; 1 Ken. 298; *S. C. nom. Robinson v. Hicks*, 3 Bro. P. C., Toml. Ed., 180), and to have been adopted in other cases (see *Doe d. Blandford v. Applin*, 4 T. R. 87; *Denn d. Webb v. Puckey*, 5 T. R. 303; *Doe d. Candler v. Smith*, 7 T. R. 531), is now exploded, as it is indeed merely an inaccurate description of the operation of the rule in *Shelley's Case*. “The doctrine,” says Lord Denman, “that the general intent must overrule the particular intent, has been much, and we conceive justly, objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results. In its origin it *was merely descriptive of the operation of the rule in Shelley's Case*, and it has since been laid down in others, where technical words of limitation have been used, and other words, showing the intention of the testators that the objects of his bounty should take in a different way from that which the law allows, have been rejected; but, in the latter cases, the more correct mode of stating the rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson v. Wright* (2 Bligh, 57). This doctrine of general and particular intent ought to be carried no further than this; and thus explained, it should be applied to this and all other wills.” *Doe d. Gallini v. Gallini*, 5 B. & Ad. 640.

Nor will a limitation to heirs general, superadded to the word *issue*, convert it into a word of purchase; and the rule in *Shelley's Case* (as we have formerly seen is the case, when a similar limitation comes after the limitation to the heirs of the body), will still take effect. Thus in *King v. Burchell* (1 Eden, 424), where the testator devised an estate to A. for life, and after the determination

of that estate he gave the same to the *issue male of A.*, lawfully begotten, and to his and their heirs, share and share alike, and for want of such issue over, with a proviso that if A. or his issue aliened the premises, they should be charged with 2,000*l.* Lord Keeper Henley held, that A. took an estate tail, and that the provision was void, as repugnant to the estate. The case of *Loddington v. Kims* (1 Salk. 224; Ld. Raym. 203), although the Lord Keeper endeavours to distinguish it, must in effect be considered as overruled; and *Doe d. Cooper v. Collis* (4 T. R. 294), although put on special grounds, can scarcely be considered as a right decision. See also *Elton v. Eason*, 19 Ves. 73; *Denn d. Webb v. Puckey*, 5 T. R. 299; *Frank v. Stovin*, 3 East, 548; *Manning v. Moore*, Alc. & Nap. 96; *Griffiths v. Evan*, 5 Beav. 241.

And although in some cases weight seems to have been laid upon the circumstance, that there was a limitation over in default of issue (*Frank v. Stovin*, 3 East, 551; and see *Woodhouse v. Herrick*, W. R. 1854-5, p. 303), it does not seem that it is essential in order to confer an estate tail upon an ancestor, when there has been a previous limitation to him for life with remainder to his issue. *Jack v. Fetherston*, 9 Bligh, 237; S. C. 3 C. & F. 67, nom. *Fetherston v. Fetherston*.

Although words of distribution are made use of, after a life interest in the ancestor and a gift to the issue, the ancestor will nevertheless take an estate tail by the operation of the rule. Suppose, for instance, land be devised to A. for life, and after his decease, to and amongst his issue, A. will take an estate tail. See *Doe d. Blandford v. Applin*, 4 T. R. 82, which, although disapproved of, both by Eyre, C. J., in *Burnsall v. Davy*, 1 Bos. & Pul. 215, and by Lord Thurlow in *Jacobs v. Amyatt*, 4 Bro. C. C. 542, must now be considered as firmly established. Thus in the case of *Doe d. Cock v. Cooper*, 1 East, 229, where there was a devise to A. for the term only of his natural life, and after his decease unto the lawful issue of the said A. as tenants in common; but in case the said A. should die without leaving lawful issue then over, it was held by the Court of King's Bench, that A. took an estate tail. See also *Ward v. Bevil*, 1 Y. & J. 512; *Tate v. Clarke*, 1 Beav. 100; *Harrison v. Harrison*, 7 Mann. & Gr. 938; 8 Scott, N. R. 862; *Doe d. Cannon v. Rucastle*, 8 C. B. 876; *Rimington v. Cannon*, 12 C. B. 18; *Kavanagh v. Morland*, Kay, 16; *Woodhouse v. Herrick*, W. R. 1854-5, p. 303.

It has been held, that a devise over in case no issue lived to attain twenty-one, would have the effect of giving the ancestor only a life estate, notwithstanding a limitation to "the issue of his body," coming after a limitation to him for life, *Merest v. James* (4 Moore, 327; 1 Bro. & Bing. 127); but as a similar construction in *Doe v. Goff* (11 East, 668) was considered

improper, both by Lord Eldon and Lord Redesdale, in their judgments in the important case of *Jesson v. Wright* (2 Bligh, 1 ; see ante, p. 488), we must consider it as overruled, unless we conclude, that the use of the word "issue," in *Merest v. James*, renders it distinguishable from *Jesson v. Wright*.

Where, however, after a limitation for life to the ancestor, there is a devise to the issue *in fee* with words of distribution, the issue will take as purchasers, and the ancestor will only take a life estate. Thus in *Lees v. Mosley*, 1 Y. & Coll. Ex. Ca. 589, a testator devised a farm, &c., as follows : "Unto my two sons Henry James and Oswald Feilden in moieties, as tenants in common, and not as joint tenants, in such manner and subject to such charges as hereinafter mentioned ; that is to say, as to one moiety or equal half share thereof, to my son Henry James for life, with remainder to his lawful *issue and their respective heirs*, in such shares and proportions, and subject to such charges as he the said Henry James shall by deed or will appoint ; but in case my said son Henry James shall not marry and have *issue*, who shall attain the age of twenty-one years, then I give and devise the said moiety to my son Oswald and his heirs for ever." And as to the other moiety of the said farm, the testator gave and devised the same to his son Oswald and his heirs absolutely for ever. It was held by the Court of Exchequer that Henry James took an estate for life in the first moiety, with remainder to his children as tenants in common in fee.

Alderson, B., in his very able and instructive judgment, which, in fact, contains a complete summary of the law upon this subject, observes, "Upon a careful examination of the authorities, we think that it may be safely laid down as a rule, that in a devise technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus if the words heirs of the body, which are technical words, properly admitting only of one meaning, are used, it becomes necessary to show affirmatively that the testator meant clearly to use them as words of purchase, or, more correctly, as words descriptive, not of all the descendants of the body, but of one definite class only of such descendants. It is not enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to show a probable conjecture that he intended to designate children only by that phrase." After referring to *Jesson v. Wright*, 2 Bligh, 1, ante, p. 496, his Lordship added, "Another instance of the application of the rule with which we began, may be found in that class of cases in which 'sons or children,' which in their proper sense are words of purchase, have been held to be words of limitation. There, in like manner, it must be demonstrated from the will

affirmatively and clearly, that by these expressions the testator meant all the descendants of the body to take as heirs."

"There is, however, a third class of cases, where a testator uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now here the investigation takes a different course. It will be merely directed to the solution of the question in *what sense the testator intended to use the expression*, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the *primâ facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the Court is ultimately to decide."

His Lordship next, referring to the authorities, viz. the Statute De Donis, 13 Ed. 1, c. 1, the opinion of Wilmot, C. J., in *Roe v. Grew* (2 Wils. 322), of Willes, C. J., in *Ginger v. White* (Willes, 348), of Lord Kenyon in *Doe v. Collis* (4 T. R. 294), and of Sir Edward Sugden in *Ryan v. Cowley* (L. & G. Ca. t. Sugd. 7), comes to the conclusion that the word "issue" may be used with a double meaning. "In all of them," continues his Lordship, "it is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, or as confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate tail to the ancestor. It might even perhaps be conceded that this is *primâ facie* its meaning. But the authorities clearly show that whatever be the *primâ facie* meaning of the word 'issue,' it will yield to the intention of the testator to be collected from the will; and that it requires a *less demonstrative context* to show such intention than the technical expression of 'heirs of the body,' would do. If this be so, the Court in the present case has to look to the terms in this will, in order to ascertain whether by construing the word 'issue' here as a word of purchase or of limitation, they best effectuate the intention of the devisor. The testator begins by devising an express estate for life to his son Henry James. He then devises in remainder to his lawful issue. If it stopped there it would be an estate tail; for the word 'issue' might include all descendants; and here, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's Case* would apply, and would convert the estate for life, previously given, into an estate tail. But the testator then adds, 'and their respective heirs, in such shares and proportions, and subject to such charges as he the said Henry James should by will or deed appoint.' Now, according to the case of *Hockley v. Manbey*

(3 Bro. C. C. 82), the effect of this clause would but give the objects of the power an interest in an equal distributive share, in case the power were not executed. The clause, therefore, is equivalent to a declaration by the testator that the issue and their respective heirs should take equal shares, but that Henry James should have a power of distributing among them the estate in unequal shares if he thought fit.

"Now if issue be taken as a word of limitation, the word 'heirs' would be restrained to 'heirs of the body,' and then altogether rejected as unnecessary. The word 'respective' could have no particular meaning annexed to it, and the apparent intention of the testator to give to Henry James for life, and afterwards to distribute his property in shares amongst the issue, would be frustrated. On the other hand, if issue be taken as a word of purchase, designating either the immediate issue or those living at the death of Henry James, the apparent intention will be effectuated, and all these words will have their peculiar and ordinary acceptations. If then the will stopped here, it would seem clear that the Court ought to read 'issue' as a word of purchase.

Then comes the devise over:—"But in case my son Henry James shall not marry and have issue who shall attain the age of twenty-one, then I give and devise to my son Oswald in fee." Now the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining twenty-one. And if, by the former part of the will, the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert the estate previously given into an estate tail. In fact, the case of *Doe v. Burnsall* (6 T. R. 30) is a distinct authority on this part of the case. Upon the whole, therefore, we have no doubt in this case that the testator's intention was not to give his son an estate tail; and we think that we best effectuate that intention by construing the words 'lawful issue' in this will, accompanied by their context, as words of purchase; and in so doing we do not impugn the authority of any decided case to be found in the books; for there is not one in which these words, with such a context as in this will, have ever been held to be words of limitation." See also *Tate v. Clarke*, 1 Beav. 100; *Crozier v. Crozier*, 3 Dru. & Warr. 373; 2 Conn. & Laws. 294; *Greenwood v. Rothwell*, 5 Mann. & Gr. 628; 6 Scott, N. R. 671; 6 Beav. 492; *Montgomery v. Montgomery*, 3 J. & L. 47; *Slater v. Dangerfield*, 15 Mee. & W. 263; sed vide *Harrison v. Harrison*, 7 Mann. & Gr. 928; 8 Scott, N. R. 862.

For instances where the word "issue" has been held, by force of the context, to have different meanings, as is laid down by Alderson, B., in *Lees v. Mosley*, it may be mentioned, that sometimes it is used in the sense of

children (*Ryan v. Cowley*, 1 L. & G. Ca. t. Sugd. 7; *Carter v. Bentall*, 2 Beav. 551; *Ellis v. Selby*, 7 Sim. 352; *Machell v. Weeding*, 8 Sim. 4; *Pruen v. Osborne*, 11 Sim. 132; *Peel v. Catlow*, 9 Sim. 372); and that sense will be adopted more readily where the words "children" and "issue" are used as convertible terms in the same will (*Cursham v. Newland*, 2 Bing. N. C. 58; 2 Scott, 105; 2 Beav. 145; 4 Mees. & W. 101; and see *Ridgeway v. Munkittrick*, 1 Dru. & Warr. 84), unless it appears to have been intended to use both words as meaning issue (*Dalzell v. Welch*, 2 Sim. 319). For it must be borne in mind that the word "children" may be used as synonymous with "issue." *Gale v. Bennet*, Amb. 681; *Wyth v. Blackman*, 1 Ves. 196; *S. C. nom. Wythe v. Thurlston*, Amb. 555.

Again, issue may be construed to mean sons (*Mandeville v. Lackey*, 3 Ridg. P. C. 352), or sons and daughters (*Farrant v. Nichols*, 9 Beav. 327).

The Rule in Shelley's Case as applicable to Executory Trusts.

We have hitherto considered the rule in *Shelley's Case* as applicable to legal estates, or to equitable or trust estates, where the latter are what is termed *executed trusts*.

A trust is said to be executed when no act is necessary to be done to give effect to it, the limitation being originally complete, as where an estate is conveyed unto and to the use of A. and his heirs, in trust for B. for life, remainder to the heirs of his body. In all cases of executed trusts the rules of construction are applied, with reference to the rule in *Shelley's Case*, in precisely the same manner as if the limitations were legal.

In the case, however, of an *executory* trust, where some further act is necessary to be done by the author of the trust or the trustees to give effect to it, as in the case of marriage articles, or as in the case of a will where property is vested in trustees in trust to *settle* or *convey*, Courts of Equity will not construe the limitations with legal strictness, so as to give effect to the rule in *Shelley's Case*, which is a rule of law and not of construction; but will mould the trusts according to the *intent* of the person who created them. Suppose, for instance, in the case of marriage articles, a person had agreed to settle an estate upon himself for life, and after his decease upon the heirs of his body; although, as we have before seen, the rule in *Shelley's Case* would in ordinary cases give an estate tail to the settlor, yet Courts of Equity, considering that the intention of the articles must have been to provide for the issue of the marriage, would order a settlement to be made, under which the settlor would take an estate for life only, with remainder to the heirs of his body as purchasers. *Trevor v. Trevor*, 1 Eq. Ca. Abr. 387;

S. C. 1 P. Wms. 622; *Streatfield v. Streatfield*, Ca. t. Talb. 176; and see *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 1, and note.

There is, however, a distinction between executory trusts in marriage articles and wills; the object and purpose of the former furnishing an indication of intention which must be wanting in the latter. "When the object," observes Sir W. Grant, M. R., "is to make a provision, by the settlement of an estate, for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose, and appropriate the estate to himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the Court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the Court has no such ground for decreeing a strict settlement. A testator gives arbitrarily what estate he thinks fit; there is no presumption that he means one quantity of interest rather than another—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but if it is *clearly to be ascertained from anything in the will*, that the testator did not use the expressions which he has employed in their strict technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention." *Blackburn v. Stables*, 2 V. & B. 369.

If in a will, then, there be no intrinsic evidence that such words as "heirs of the body" are to be taken as words of purchase, the rule in *Shelley's Case* will be applicable, although, as we have seen, a different construction is adopted in the case of marriage articles. See *Sweetapple v. Bindon*, 2 Vern. 536; *Jackson v. Noble*, 2 Keen, 590; 1 L. Cas. Eq., and cases there cited.

Where, however, the estate is directed to be conveyed to a person for life, "without impeachment of waste," or there are "trustees to preserve contingent remainders (*Lord Glenorchy v. Bosville*, Ca. t. Talb. 3; 1 L. Cas. Eq. 1; *Papillon v. Voice*, 2 P. Wms. 471), or to be settled upon a person and the heirs of his body, taking "special care in such settlement that it should not be in his power to dock the entail given him for life" (*Leonard v. Earl of Sussex*, 2 Vern. 526; and see *Shelton v. Watson*, 16 Sim. 543), the rule in *Shelley's Case*, will not be applicable, and the ancestor will only take an estate for life. See 1 L. Cas. Eq. 24, where the cases on the subject are collected.

GARDNER v. SHELDON (a).



Hil. 20 & 21 Car. 2, C. B. ; Rot. 1552. Adjudged 23 Car. 2, C. B.

[REPORTED VAUGHAN, 259.]

ESTATES BY IMPLICATION.]—*A testator, being seised in fee of lands, by his will, without having made any previous express devise of them, declared that his will and meaning was, that if it happened that his son G., and his daughters M. and K. should die without issue of their bodies lawfully begotten, then all the lands of which he was seised should go remain and be to his nephew W. R., and his heirs for ever :—Held, that G., M. and K. did not take any estate by implication.*

Estates by implication are not at all favoured in law, though allowed in wills with due restrictions.

An heir-at-law cannot be disinherited, except by necessary implication.

The mere fact, that some other property is given to a person by one part of a will, does not of itself prevent such person taking other property by necessary implication in another part thereof.

A devise to B. after the death of A. gives A. an estate for life by implication, if B. be heir-at-law of the testator, but no estate if he be not heir-at-law.

IN *ejectione firmæ* for lands in Sussex upon not guilty pleaded.

It is found by the special verdict, that long before the supposed trespass and ejectment, one William Rose was seised of the land in question in his demesne, as of fee, and so seised, made his last will and testament, November the second, 13 Jac., prout sequitur, and sets forth the will ; wherein, among other things,—

“ As touching the lease which I have in my farm, called Eastergate,

and all my interest therein, I do give and assign the said lease, and all my interest therein, unto my friends John Clerk, George Littlebury and Edward Rose, to the intent that, with the rents and profits thereof, they may help to pay my debts, if my other goods and chattels shall not suffice. And after my debts paid, my will is, that the rents and profits of the said land shall wholly go for and towards the raising of portions for my two daughters, Mary and Katherine, for each of them, 600*l.*, and for my daughter Mary 200*l.* more, which was given her by my father, her grandfather's will. And those sums being raised, my will is, the rents and profits of the said land shall be wholly to the use and benefit of my son *George, &c.*

"Item, I give to my daughter Mary my greatest silver bowl.

"Item, I give to my daughter Katherine one plain silver bowl, &c.

"My will and meaning is, that if it happen that my son *George, Mary and Katherine my daughters, to die without issue of their bodies lawfully begotten, then all my free lands, which I am now seised of, shall come, remain and be to my said nephew William Rose, and his heirs for ever.*"

They find that the said William Rose, the testator, before the trespass, viz. the first of June, 14 Jac., died at Eastergate, in the said county of Sussex, seised as aforesaid.

That at the time of his death he had issue of his body, lawfully begotten, George Rose, his only son, and Mary and Katherine his two daughters.

That George, the son, entered into the premises the first of July, 14 Jac. and was seised prout lex postulat.

Then after, and before the time of the trespass, viz. June the eighth and twentieth, 14 Car. 2, George died so seised of the premises at Eastergate aforesaid.

That at the time of his death he had issue of his body two daughters, Judith now wife of Daniel Sheldon, one of the defendants, and Margaret now wife of Sir Joseph Sheldon, the other defendant.

That after the death of George their father, the said Judith and Margaret entered and were seised before the trespass supposed, prout lex postulat.

That Mary, one of the daughters of the said William Rose, July

the first, 1 Car. 2, died, and that Katherine her sister survived her, and is still living.

That the said Katherine, October the first, 20 Car. 2, at East Grimsted, entered into the said tenements, and was seised prout lex postulat, and the same day and year demised the same to the said Thomas Gardner, the plaintiff, from the feast of St. Michael the Archangel then last past, for the term of five years then next following. By virtue whereof the said Thomas Gardner entered, and was possessed, until the said Joseph and Daniel Sheldon, the same first day of October, 20 Car. 2, entered upon him and ejected him.

If upon the whole matter the justices shall think the said Joseph and Daniel Sheldon culpable, they find them culpable, and assess damages to six pence, and costs to twenty shillings. But if the justices shall conceive them not culpable, they find them not culpable upon the words, "My will is, if it happen my son George, Mary and Katherine my daughters, do die without issue of their bodies lawfully begotten, then all my free lands, which I am now seised of, shall come, remain and be to my said nephew William Rose, and his heirs for ever."

Vaughan, C. J.—The first question is, whether by this will any estate be devised to the son and heir of the testator, or to his sisters?

The second question is, if any estate be devised, what estate is so devised to them, or any of them?

The third question is, what estate is by this will devised to the nephew; and if any be, how it shall take effect, whether as a remainder, or as an executory devise?

1. As to the first, it is clear, that no estate is devised to the son or daughters, or any of them by express and explicit devise; but if any be, it is devised by implication only, and collection of the testator's intent.

2. If any estate be given by this will by implication to the son or daughters, or any of them, it must be either a joint estate to them for their lives with several inheritances in tail, or several estates tail to them in succession; that is, to one first, and the heirs of his or her body, and then to another, and so successively.

3. Such an entail in succession cannot possibly be, because it appears not by the will who should first take and have such estate, and who next, &c., and therefore such an entail were merely void, for the uncertainty of the person first taking, as was rightly observed, and assented to at the bar.

It remains then, that the estate devised by this will (if any be) to the son and his two sisters, must be a joint estate for their lives, with several inheritances to them in tail, by implication only.

And I am of opinion that no such estate is devised by this will to the son and two daughters; and I shall first observe, that the law doth not, in conveyances of estates, admit estates to pass by implication regularly, as being a way of passing estates not agreeable to the plainness required by law in transferring estates from one to another. And for that the case is;—A man (*b*), according to the custom of the manor, surrendered to the use of Francis Reeve, and of John, son of the said Francis, and of the longest liver of them; and, for want of issue of John lawfully begotten, the remainder to the youngest son of Mary Seagood. John had only an estate for life, and no estate tail by implication, it being by conveyance; though (as the book is) it might perhaps be an estate tail by will; which shows estates by implication are not all favoured in law, though in men's last wills they are allowed with due restrictions.

In a will estates are often given by implication; but I shall take this difference concerning estates that pass by implication, though it be by will.

An estate given by implication of a will, if it be to the disinheriting of the heir-at-law, is not good, if such implication be only constructive and possible, but not a necessary implication (*c*).

I mean by a possible implication, when it may be intended that the

(*b*) *Seagood and Hone's Case*, Cro. Car. 336.

(*c*) Serjeant Hill has added the following MS. note to his copy of Vaughan's Reports, in the Lincoln's Inn Library:—"N.B.—That by necessary implication is meant an implication so strong as to exclude the possibility of the testator's intention not being so."

Vide the arguments in the next page.

Nothing can show it stronger than the example put in 13 H. 7, 17, by Vaughan and others, constantly relied on; 2 Vern. 571, 572, MS.; though of late times the fashion has been otherwise. Vide 1 P. Wms. 72, 63; 8 Vin. 352. The heir-at-law is not to be disinherited without express words or necessary implication; Amb. 583; vide Sty. 240; 3 Mod. 107 and MS. See also 8 T. R. 676; 12 Mod. 597.

testator did purpose, and had an intention to devise his land to A.; but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A.

But I call that a devise by necessary implication to A., when A. must have the thing devised, or none else can have it.

And therefore if the implication be only possible, and not necessary, the testator's intent ought not to be construed to disinherit the heir, in thwarting the disposition which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambiguously, to the contrary.

To this purpose the case is 8 Car. 1 (*d*), where Thomas Cann devised to Henry his youngest son;—"Item, I give to the said Henry my pastures in the Southfields; and also I will that all bargains, grants and covenants, which I have from Nicholas Welb, my son Henry shall enjoy, and his heirs for ever; and for lack of heirs of his body, to remain to my son Francis for ever."

It grew a question, whether this were an entail to Henry of the Southfields, or only of the bargains and grants which the testator had from Welb, which was a very measuring case (*e*). All the four Judges agreed, that the words of a will, which shall disinherit the heir at common law, must have a clear and apparent intent, and not be ambiguous or anyway doubtful (so are the very words of the book); and therefore they resolved in that case, that only the bargains and grants had from Welb were entailed to the youngest son, and that he had only an estate for life in the pastures in the Southfields.

1. I shall therefore now clear the difference I have taken, that the heir shall never be disinherited by a devise in a will by implication, and not explicit, where the implication is only a possible implication, and not a necessary implication.

2. In the second place, I shall show, that the words of this will do not import a devise to the son and the two daughters for their lives jointly, with respective inheritances in tail to the heirs of their several bodies, by any necessary implication, but only by an implication that is possible by construction.

3. In the third place, I shall show, that being so as to the case in

(*d*) *Spirit and Bence's Case*, Cro. Car. 368.

(*e*) *Bridg*. 132.

question, it is not material whether the devise by way of remainder to the nephew be void or not.

4. In the fourth place, *ex abundante*, and to make the will of the testator not ineffectual in that part of the will, I shall show, that the nephew hath not the land devised to him when the son and the two daughters die without issue of their respective bodies, by way of remainder, which cannot be but by way of executory devise, which well may be.

5. That by such executory devise no perpetuity is consequent to it; or if it were, such a perpetuity is no way repugnant or contrary to law.

To manifest the difference taken between an implication in a will that is necessary, and implication that is only possible, the first case I shall cite is that known case, 13 H. 7 (*f*), which I shall exactly put as it is in the book at large. A man devised his goods to his wife, and that after the decease of his wife his son and heir shall have the house where his goods are. The son shall not have the house during the wife's life; for though it be not expressly devised to the wife, yet his intent appears, the son shall not have it during her life; and therefore it is a good devise to the wife for life by implication, and the deviser's intent, *quod omnes justitiiarii concesserunt*.

Here I observe,—1. That this was a devise of the house to the wife by necessary implication; for it appears by the will that the testator's son and heir was not to have it until after the death of the wife, and then it must either be devised to the wife for life, by necessary implication, or none was to have it during the wife's life, which could not be.

2. I observe upon this case, that though the goods were by particular devise given to the wife and expressly, that was no hindrance to the wife's having the house devised to her also by her husband by implication necessary: which I the rather note, because men of great name have conceived, that where the devisee takes anything by express devise of the testator, such devisee shall not have any other thing by that will devised, only by implication. Which difference, if it were according to law, it makes clearly against the plaintiff, because his lessor, being one of the daughters of the testator, had devised to her expressly 600*l.* for a portion, and therefore she should not have any

estate in the land by the same will, by a devise by implication, as is pretended. But the truth is, that is a vain difference that hath been taken by many, as I shall anon evince; and therefore I shall not insist upon any aid from it to my conclusion.

3. I note that this devise being before the statute of 32 H. 8, of Wills, the house devised must be conceived devisable by custom at the common law.

Before I proceed further, I must take notice that Brook, in abridging the case of 13 H. 7, in the same numero, saith,—“It was agreed, tempore H. 8 (g), per omnes, that if a man will that J. S. shall have his land in Dale, after the death of his wife, the wife shall have the house for her life by his apparent intent.” I note first, that this case is imperfectly put in Brook, for it mentions a devise of the land in Dale to J. S. after the death of his wife, and then concludes that the wife shall have the house for her life by his apparent intent; whereas no mention is made of a house, but of the land in Dale, in the devise; and this case seems to be only a memory of another case, not abridged by Brook (h) out of any other Year-book, but reported in his abridgment in the title “Devise,” as a case happened in 29 H. 8, which is, that if a man will that J. S. shall have his land after the death of his wife, and dies, the wife of the devisor shall have those lands for term of her life by those words, *ratione intentionis voluntatis*. Which cases being in truth but one and the same case, seem to go further than the case of 13 H. 7; for there, as I observed before, the wife was to take by necessary implication, because the heir was excluded expressly by the will during the life of the wife.

But by this case in Br. title “Devise,” n. 48 and 52, there is no excluding of the heir, and yet it is said the wife shall have the land during her life by implication, which is no necessary implication, as in the case of 13 H. 7, but only a possible implication, and seems to cross that difference I have taken before.

But this case of Brook hath many times been denied to be law, and several judgments have been given against it. I shall give you some of them, to justify the difference I have taken, exactly as I shall press the cases.

(g) Br. “Devise,” n. 52.

(h) Br. “Devise,” 29 H. 8, n. 48.

Trinity, 3 E. 6 (i). A man seised of a manor, part in demesne and part in services, devised all the demesne lands expressly to his wife during her life; and devised to her also all the services and chief rents for fifteen years, and then devised the whole manor to a stranger after the death of his wife. It was resolved by all the Justices, that the last devise should not take effect for any part of the manor, but after the wife's death; but yet the wife should not have the whole manor by implication during her life, but should have only the demesnes for her life, and the rent and services for fifteen years, and that after the fifteen years ended the heir should have the rents and services as long as the wife lived; here being no necessary implication that the wife should have all the manor during her life, with an exclusion of the heir, she had no more than was explicitly given her by the will, viz. the demesnes for life, and the rents and services for fifteen years; but after the fifteen years the heir had the rents and services, for it could be no more at most but a possible implication that the wife should have the whole manor during her life.

But with a small variance of this case, if the demesnes had been devised to the wife for life, and the services and rents for fifteen years, and the whole manor after the wife's life to J. S., and that after the wife's life and the life of J. S. his heirs should have had the demesnes and services and rents, in that case it had been exactly the same with the case of 13 H. 7; because the devisor's intent had been then apparent that the son was not to have the manor, or any part, until the wife and stranger were both dead; and, as it was adjudged, the stranger had nothing in the manor until the wife's death; therefore in that case, by necessary implication, the wife must have had both demesnes and services during her life, notwithstanding the explicit devise to her of the rents and services for fifteen years, otherwise none should have had the rents and services after the fifteen years, during the wife's life, which was not to be intended.

Another case I shall make use of is a case Paschæ 15 El. (k). A man seised of a messuage, and of divers lands occupied with it, time out of mind, leased part of it to a stranger for years, and after made

(i) 3 E. 6, Moore's Rep. f. 7, n. 24.

(k) 15 El., Moore, f. 123, n. 265.

his last will in these words:—"I will and bequeath to my wife my messuage, with all the lands thereto belonging, in the occupation of the lessee; and after the decease of my wife, I will that it, with all the rest of my lands, shall remain to my younger son. The question in that case was, whether the wife should have the land not leased by implication for her life; because it was clear the younger son was to have no part until the death of the wife. And the Lord Anderson at first, grounding himself upon that case in *Brook* (as it seems), of 29 H. 8, twice by *Brook* remembered in his title "*Devise*," n. 28, and after, n. 52, was of opinion that the wife should have the land not leased by implication. But *Mead* was of a contrary opinion, for that it was expressly devised, that the wife should have the land leased; and therefore no more should be intended to be given her, but the heir should have the land not in lease during the wife's life. To which *Anderson*, *mutata opinione*, agreed. Hence, perhaps, many have collected that a person shall not take land by implication of a will, if he takes some other land expressly by the same will; but that is no warrantable difference.

For vary this case but a little, as the former case was varied, that the land in lease was devised to the wife for life, and after the death of the wife all the devisor's land was devised to the youngest son, as this case was, and that after the death of the wife and the youngest son the devisor's heir should have the land both leased and not leased, it had been clear that the heir (exactly according to the case of 13 H. 7) should have been excluded from all the lands, leased and not leased, until after the death of the wife and the younger son. And therefore in such case the wife, by necessary implication, should have had the land not leased, as she had the land leased, by express devise, and that notwithstanding she had the leased land by express devise, for else none could have the land not leased during the wife's life.

Wadham (1) made a lease for years, upon condition the lessee should not alien to any besides his children. The lessee deviseth the term to *Humphrey* his son, after the death of his wife, and made one *Marshall* and another his executors, and died. The lessor entered, as for breach

(1) *Horton v. Horton*, Cro. Jac. f. 74, 75.

of the condition, supposing this a devise to the wife of the term by implication. The opinion of the Judges was, it was no devise by implication, but the executors should have the term until the wife's death; but it was said, if it had been devised to his executor after the death of his wife, there the wife must have it by implication, or none could have had it. But Popham, C. J., denied that case, because if the devise had been to the executors after the wife's death, the executors should, when the wife died, have had the term as legatees, but until her death they should have it as executors generally, which by all opinions fully confirms the difference taken, that a devise shall not be good by implication, when the implication is not necessary; and in this case all agreed the case in 13 H. 7 to be good law, because the implication there was necessary.

Edward Clache (*m*) being seised of two messuages in soccage tenure [one of the annual value of twenty-four shillings, and the other of thirty-six shillings], and leaving issue a son and two daughters by three several venters. His son being dead in his lifetime, and leaving two daughters, who were heirs at law to the father, devised one of the messuages [that of the value of twenty-four shillings] to Alice his daughter, and her heirs for ever; and the other to Thomazine his [youngest] daughter, [being then of the age of eight years,] and her heirs for ever, with a limitation, that if Alice died without issue, living Thomazine, Thomazine should then have Alice's part, to her and her heirs; and if Thomazine died before the age of sixteen years, Alice should have her part in fee also. And if both his said daughters died without issue of their bodies, then the daughters of his son should have the messuages. The youngest daughter of the testator died without issue, having past her age of sixteen years. It was resolved, that the words in the will, "If his two daughters died without issue of their bodies," did not create, by implication, cross remainders in tail to the devisor's daughters, whereby the eldest should take the part of the youngest, but her part should go to the heirs at law, according to the limitation of the will; and those words were but a designation of the time when the heirs at law should have the messuages.

Note, that one of the daughters dying without issue, the heirs at law by the will had her part, without staying until the other daughter died without issue.

1. From these cases I first conclude, that only possible implication by a will, shall not give the land from the right heir, but a necessary implication which excludes the right heir, shall give it.

2. That the difference taken is not sound, that one shall not take, by implication of a will, any land where the same person hath other land or goods expressly devised by the same will; for if the implication be necessary, the having of land, or any other thing, by express devise, will not hinder another taking also by implication, as appears in the three cases by me made use of, viz. 13 H. 7; 3 E. 6; 15 Eliz.,—cited out of Moore.

3. Whether anything be given expressly by will, or not, a possible implication only shall not disinherit the heir, where it may as well be intended that nothing was devised by implication, as that it was. But if any man think that to be material, in this case the daughters had respective portions expressly devised to them, viz. six hundred pounds to each of them, and therefore shall not have the land also by implication only possible to disinherit the right heir.

For the second point, these words—"my will is, if it happens my son George, Mary and Katherine my daughters, to die without issue of their bodies lawfully begotten, then all my free lands shall remain and be to my said nephew William Rose and his heirs for ever"—are so far from importing a devise of the land to the son and daughters for their lives, with respective inheritances in tail, by any necessary implication, that both grammatically, and to common intendment, they import only a designation and appointment of the time when the land shall come to the nephew, namely, when George, Mary and Katherine happen to die issueless, and not before.

And where the words of a will are of ambiguous and doubtful construction, they shall not be interpreted to the disinheriting of the right heir, as is already shown.

This being clear, that there is no devise by this will of the land by implication in any kind to the son and daughters, it follows that Katherine, the surviving daughter of the testator, and lessor of the plaintiff,

had no title to enter and make the lease to the plaintiff Gardner ; and then as to the case in question before us, which is only, whether the defendants be culpable of ejecting the plaintiff, it will not be material whether the devise to the nephew William Rose, be void, or not ; and if not void, how and when he shall take by the devise, which may come in question perhaps hereafter.

4. But to that point *ex abundante*, and to make the will not ineffectual in that point of the devise to the nephews, if no estate for lives, or other estate, be created by this will by implication to the son and daughters, it follows, that the nephew can take nothing by way of remainder, for the remainder must depend upon some particular estate, and be created at the same time with the particular estate (*n*). The remainder is the residue of an estate in land depending upon a particular estate, and created together with the same ; and the will creating no particular estate, the consequence must be, that the land was left to descend in fee simple to the heir-at-law, without creating either particular estate or remainder upon it.

Sir Edward Coke hath a case (*o*), but quotes no authority for it. If land be given to H. and his heirs, as long as B. hath heirs of his body, the remainder over in fee, the remainder is void, being a remainder after a fee simple, though that fee simple determines when no heirs are left of the body of B. Whether that case be law or not, I shall not now discuss ; in regard that when such a base fee determines for want of issue of the body of B. the land returns to the grantor and his heirs, as a kind of reversion ; and if there can be a reversion of such estate, I know not why a remainder may not be granted of it ; but for the former reason, this can be no remainder, because there is no particular estate upon which it depends ; and if the *Lord Coke's Case* be law, it is the stronger, that no remainder is in this case (*p*).

But without question a remainder cannot depend upon an absolute fee-simple by necessary reason ; for when all a man hath of estate, or anything else, is given or gone away, nothing remains but an absolute fee-simple, being given or gone out of a man, that being all, no other or further estate can remain to be given or disposed of, and, there-

(*n*) Co. Litt. f. 49 a.

(*o*) Co. Litt. f. 18 a.

(*p*) Co. Litt. f. 18 a, a. 11.

fore, no remainder can be of a pure fee-simple. To this purpose is the case of Hearn and Allen (*q*) in this Court. Richard Keene, seised of a messuage and lands in Chipping Norton, having issue Thomas his son and Anne a daughter by the same venter, devised his land to Thomas his son, and his heirs for ever; and for want of heirs of Thomas to Anne and her heirs, and died. It became a question, whether Thomas had an estate in fee or in tail by this will, for he could not die without heir if his sister outlived him, who was to take according to the intent of the devisor. Two Judges held it (and with reason) to be an estate tail in Thomas, and the remainder to the daughter, *who might be his heir*, shewed, that the devise to him and his heirs could be intended only to be to him (*r*) and the heirs of his body; but three other Judges held it to be a devise in fee; but all agreed if the remainder had been to a stranger it had been void, for then Thomas (which is only to my purpose) had had an absolute estate in fee, after which there could be no remainder, which is undoubted law.

The case out of Coke's Littleton and this case are the same to this purpose, that a remainder cannot depend upon a fee simple: yet in another respect they much differ. For in this last case, after an estate in fee devised to Thomas, and if he died without heir the remainder to a stranger or sister of the half blood, not only the remainder was void as a remainder, but no future devise could have been made of the land by the devisor; for if Thomas died without heir the land escheated, and the lord's title would precede any future devise.

But in that case of Sir Edward Coke, which he puts by way of grant, if it be put by way of devise, that if land be devised to H. and his heirs, as long as B. hath heirs of his body, the remainder over, such later devise will be good, though not as a remainder, yet as an executory devise, because somewhat remained to be devised when the estate in fee determined upon B.'s having no issue of his body.

And as an executory devise and not as a remainder, I conceive the nephew shall well take in the present case. And the intention of the testator by his will, will run as if he had said, I leave my land to descend to my son and his heirs according to the common law, until he and both my daughters shall happen to die without issue; and then I devise my

land to my nephew William Rose, and his heirs. Or as if he had said, my son shall have all my land to have and to hold to him and his heirs, in fee simple, as long as any heirs of the bodies of A., B. and C. shall be living; and for want of such heirs I devise my land to my nephew William Rose and his heirs. The nephew shall take as by a future and executory devise (s).

And there is no difference whether such devise be limited upon the contingency of three strangers dying without heirs of their bodies, or upon the contingency of three of the devisor's own children dying without heirs of their bodies; for if a future devise may be upon any contingency, after a fee simple, it may as well be upon any other contingency if it appear by the will the testator intended his son and heir should have his land in fee simple.

This way of executory devise after a fee simple of any nature was in former ages unknown, as appears by a case in the Lord Dyer, 29 H. 8, fol. 33, concerning a devise to the prior of St. Bartholomew in West Smithfield, by the clear opinion of Baldwin and Fitzherbert, the greatest lawyers of the age.

But now nothing is more ordinary. The cases are for the most part remembered in *Pells v. Brown*, that is, Cro. Jac. 590; *Clache's Case*, Dyer, 330 b; *Wellcoke and Hamond's Case*, cited in *Boraston's Case*, 3 Co. 20 b; *Fulmerston v. Steward*, Plowd. 102.

I shall instance two cases. The first is *Haynsworth v. Pretty* (t), where a man seised of land in soccage, having issue two sons and a daughter, devised to his youngest son and daughter twenty pounds apiece, to be paid by his eldest son, and devised his lands to his eldest son and his heirs, upon condition if he paid not those legacies, that his land should be to his second son and daughter, and their heirs. The eldest son failed of payment; after argument upon a special verdict, it was resolved by the Court, clearly, that the second son and daughter should have the land.

1. For that the devise to his son and his heir in fee, being no other than what the law gave him, was void.

(s) It is clear in this case, that according to the law, as now settled, the executory devise over to the nephew on the failure of the issue of the son and daughters of

the testator, would be held void as being too remote. See ante, p. 361.

(t) Cro. Eliz. 833 a.

2. That it was a future devise to the second son and daughter, upon the contingency of the eldest son's default of payment.

3. That it was no more in effect than if he had devised, that if his eldest son did not pay all legacies, that his land should be to the legatories, and there was no doubt in that case, but the land, in default of payment, should vest in them.

Which case, in the reason of law, differs not from the present case, where the land is devised by devise future and executory to the nephew, upon a contingency to happen by the testator's son and daughters having no issue.

The second case is that of *Pells v. Brown* (u): the father being seised of certain land, having issue William his eldest son, Thomas and Richard Brown, devised the land to Thomas and his heirs for ever; and if Thomas died without issue, living William, then William should have the lands to him, his heirs and assigns.

1. This was adjudged an estate in fee simple in Thomas.

2. That William, by way of executory devise, had an estate in fee simple in possibility, if Thomas died without issue before him.

And it being once clear, that the estate of Thomas was a fee simple, determinable upon a contingency, and not an estate tail, and so in the present case it being cleared, that George, the testator's son, had the land descended to him in fee from the testator, and took no estate tail expressly, or by implication from the will, it will not be material whether the contingency which shall determine that fee simple proceeds from the person which hath such determinable fee, or from another, or partly from him, and partly from another, as in *Haynsworth's Case*, the son determined his fee simple by not paying the legacies. In *Pells v. Brown*, Thomas's fee simple determined by his dying without issue, living William. The fee simple vested in George the son by descent, determines when he and his two sisters die without issue; and upon such determination in every of these cases, the future and executory devise must take effect.

But the great objection is, that if this should be an executory devise to the nephew, upon the contingency of George the son, and both his

(u) *Pells v. Brown*, Cro. Jac. 590.

sisters dying without issue, it will be dangerous to introduce a new way of perpetuity ; for if a man have several children, and shall permit his estate to descend, or by his will devise it to his heir, so as he may therein have an unquestionable fee-simple (which is the same with permitting it to descend), he may then devise it futurely, when all his children shall die without issue of their bodies to J. S. and his heirs, as long as A., B. and C., strangers, shall have any heirs of their bodies living, and then to a third person by like future devise ; for if he should devise it futurely to J. S. and his heirs, as long as J. S. had any heirs of his body, it were a clear estate tail in J. S., upon which no future devise could be, but it would be a remainder to be docked.

This objection (x) was in some measure made by Doddridge in *Pells v. Brown*, and the Judges said there was no danger, because the estate in fee of Thomas did not determine by his dying without heir of his body generally, but by dying without issue, living William ; for if the land had been given to Thomas and his heirs for ever, and if he died without heirs of his body, then to William and his heirs, Thomas's estate had been judged an estate tail with the remainder to William, and not a fee, upon which no future or executory devise can be. So was it adjudged in *Foy v. Hynde*, Cro. Jac. 695, 696, and anciently, 37 Ass. p. 18 ; 5 H. 5, f. 6, and to be within the reason of *Mildmay's Case*, 1 Co. 175, and *Corbet's Case*, Ib. 83 b, of Perpetuities.

But in *Pells v. Brown*, the Judges said it was more dangerous to destroy future devises, than to admit of such perpetuities as could follow from them any way by determinable fee-simples, which is true ; for a fee simple, determinable upon a contingency, is a fee simple to all intents, but not so durable as absolute fee-simples. And all fee-simples are unequally durable, for one will escheat sooner than another by the failure of heirs. An estate of fee-simple will determine in a bastard with his life, if he want issue. An estate to a man and his heirs as long as John Stiles hath any heir, which is no absolute fee-simple, is doubtless as durable as the estate in fee, which John Stiles hath to him and his heirs, which is an absolute fee-simple. Nor do I know any law simply against a perpetuity, but against entails of perpetuity, for every fee-simple is a perpetuity, but in the accident of alienation,

(x) Vide *Gay v. Gay*, Sty. Rep. 258, 275.

and alienation is an incident to a fee simple determinable upon a contingency as to any more absolute or more perdurable fee-simple.

The Chief Justice, Justice Archer and Justice Wylde, for the defendant. Justice Tyrrell, for the plaintiff.

Judgment for the defendant.

It is proposed in this note to consider the subject so well discussed by Chief Justice Vaughan in the principal case (spoken of by Lord Alvanley, M. R., as "the great case that every one has in his mind," 5 Ves. 806), viz. what, in the absence of express words, is sufficient to confer an estate or interest in property by implication.

An estate by implication of law has place only in limitations of use, either by assurances operating merely by the statute, or through the medium of a conveyance to serve the uses, and in devises by wills (1 Prest. Est. 190); for, as is laid down in the principal case, "the law (that is, the common law) does not, in *conveyances* of estates, admit of estates to pass by implication regularly, as being a way of passing estates not agreeable to the plainness required by law in transferring estates from one to another." See ante, p. 508, and see Prest. Est. 190.

Life Estate to a Person, whether implied by a Gift over upon his Death.

A good example of the application of the principle laid down by Vaughan, C. J. (viz. that the heir can only be disinherited by necessary implication), is seen in the cases which he cites, establishing the proposition, that where a devise is made to the testator's *heir-at-law* after the death of another person, there such person will take a life estate by *necessary* implication, because, in the absence of such implication not only would the heir-at-law take the estate, after the death of the other person, but he would also take it until his death by descent; in other words, no effect would be given to the words of the devise, which clearly would be against the intention of the testator (13 Hen. 7, 17; Br. "Devise," pl. 52; *Upton v. Lord Ferrers*, 5 Ves. 806; *Dashwood v. Peyton*, 18 Ves. 40; *Doe d. Driver v. Bowling*, 5 B. & Ald. 722, 727; *King v. Ringstead*, 9 Barn. & Cress. 218); where, however, the devisee in a similar case is not the heir, although it may be probable that the testator intended that the person, upon whose death the estate is given to the devisee, should take an estate for life; still there is, to use the words of Vaughan, C. J., in the principal case, no necessary implication that such is the case, but only a *possible* implication, for the testator

may have intended the estate, in the mean time, to descend to his heir, no estate for life, therefore, will arise by implication. See ante, p. 510; *Upton v. Lord Ferrers*, 5 Ves. 806; *Aspinall v. Petvin*, 1 S. & S. 550; sed vide *Ex parte Rogers*, 2 Madd. 455; *Den d. Franklin v. Trout*, 15 East, 394.

The implication of a previous life estate will arise, although the devisee be not described as heir; but it seems to be the better opinion, that he must be heir at the time of the will being made, and not merely heir, by the happening of subsequent, events at the death of the testator, 1 Jarm. Wills, 445.

The implication has been raised where the devise over, after the death of a particular person, has been to several children of the testator, of whom the heir-at-law was one. See *Blackwell v. Bull*, 1 Keen, 176, in which case the testator desired his business to be carried on by his wife and eldest son for the mutual benefit of the family, and likewise devised in trust all his property for the following purpose; that is to say, that at *his wife's decease*, the whole of his property, as well freehold as personal, should be equally divided amongst his children (naming them), their executors and assigns, share and share alike. The question being raised whether the wife was not entitled by implication to a life interest in the freehold and personal estate, Lord Langdale, M. R., decided in her favour, observing, "As to the property not engaged in the trade, though the case, as regards the real estate, is not without difficulty, yet on the whole will, and what appears to me the evident intention, I think the widow is entitled to a life interest in both the real and personal estate." See also *Cockshott v. Cockshott*, 2 Coll. 432.

Where an express life interest is given in *part* of the lands to the person upon whose death the *whole* of the lands are devised to the heir-at-law, such person will not in general be considered by necessary implication to be entitled to a life interest in the lands not expressly devised to him, since, by what has been termed the distributive mode of construction, the words giving over the whole of the lands on the decease of the person having a life interest in a part of the lands, will be considered as applicable to those lands alone; and the remainder will at once go to the devisee. Thus in *Sympton v. Hornsby*, Prec. Ch. 439, 452; *S. C.* 2 Vern. 723. Where a testator devised several lands in several towns to his wife for life for her jointure, and afterwards devised *all* his lands, tenements and hereditaments whatsoever, *after the death of his wife*, to his daughter B. and the heirs male of her body, and for want of such issue to his daughter J. for life, with remainder to her first and other sons in tail male. Lord Chancellor Cowper held, that the wife did not take an estate for life by implication, and that the words of the will were to be taken distributively, as in *Cook v. Gerrard* (1 Saund. 180; 1 Lev. 212); "that is to say, all the lands which he had before given to his wife, to go to his daughter after her death, and all other his lands, not

before devised, to his daughter immediately; and to make any other construction on those general words would be absurd, when he had before in such full and express words provided for his wife; besides that, in no case an heir-at-law is to be disinherited by implication, unless it be necessary, which in this case it is not."

So in *Doe d. Annandale v. Brazier*, 5 B. & Ald. 64, the testator bequeathed the rents of his messuage at New Brentford to his son-in-law for life, and *from and after his decease* he gave and bequeathed the same rents, *together with* the rents of *all other* his messuages at New Brentford, unto the three nephews and niece therein named (who were not his heirs-at-law), for their respective lives; and after the decease of the survivor of them, he gave and devised all his said messuages to trustees upon trust to sell, and to pay the produce unto such of the children of his nephews and niece, as should be living at the decease of the survivor of them; and then devised the residue of his estate to his son-in-law. It was held by the Court of King's Bench, that upon the death of the testator, the nephews and niece took an immediate estate, for their lives and the life of the survivor, in the rents of all the messuages, except the house specifically bequeathed to the son-in-law for his life. "The case of *Cook v. Gerrard* (1 Saund. 180; 1 Lev. 212)", observed Bayley, J., "is an authority in point. In that case, the testator had two estates, one in possession, and another in reversion expectant on the death of A. B. He devised the former to his widow for one year, and then he devised both to the lessors of the plaintiff, to hold immediately after the expiration of the year from his decease, and the decease of A. B. Therefore the lessor of the plaintiff was, according to the words, to hold from and immediately after the expiration of one year after the death of the testator, and the decease of A. B. The question was, whether the whole was postponed until after A. B. died. The Court decided not, but that the words were to be taken distributively, and that "after the decease of A. B." was only to be applied to that estate in which A. B. had an interest. And so in this case, these words "after the decease of his son-in-law," may fairly be confined to that house, the rents of which had previously been given to the son-in-law for his life; but as to the residue it is a present and immediate devise." See also *Boon v. Cornforth*, 2 Ves. 277; *Doe d. Driver v. Bowling*, 5 B. & Ald. 722; *Drew v. Killick*, 1 De G. & Sm. 266; *Simmons v. Rudall*, 1 Sim. N. S. 266; sed vide *Aspinall v. Petvin*, 1 S. & S. 445; *King v. Ringstead*, 9 Barn. & Cress. 218; *Davenport v. Coltman*, 9 Mees. & W. 481; 12 Sim. 588; *Attwater v. Attwater*, 18 Beav. 330.

The implication, however, of a life interest to a person, from a devise over on his death to the heir-at-law, will not it seems arise, if there be a residuary devise, inasmuch as that disposes of the necessary presumption which

is essential in order to confer a life estate by implication; and the case stands upon precisely the same footing, as a devise made to a stranger instead of the heir. See *Horton v. Horton*, Cro. Jac. 74, in which case, however, personal property was in question, and there had been an appointment of executors, in terms which carried to them the residue in the same manner as a residuary bequest would carry undisposed of personal estate.

A devise to the survivor of several persons, and the child or children of those who died, has been held to give life interests to all such persons by implication. Thus in *Saunders v. Lowe*, 2 Wm. Black. 1014, the testator devised his estate at Tenbury, in trust to receive the rents and profits during the lives of his four daughters, and the survivor of them, and “*afterwards* to pay such rents and profits to and amongst *such survivor*, and the child and children of such my daughters who shall first happen to die; and from and immediately after the decease of the survivor of my said four daughters, then my will is, that they do sell the premises and pay the monies arising therefrom in four equal parts, to and among the several children of my said respective four daughters, share and share alike.” In a subsequent clause he bequeathed the residue of his goods and chattels among all his children equally, except his daughter Hester, “who is only to receive in full satisfaction of what is bequeathed her, 3s. per week during her life, or until her distributory share be exhausted, out of my estate and effects at Tenbury, and personal effects, for her sole and separate use exclusive of her husband.” The Court was very clearly of opinion, that the testator never meant to leave all his daughters without any provision till three of them were dead, and then capriciously leave it to chance, which of them should survive and share the accumulated profits. The subsequent clause showed, that his daughter Hester was, in his opinion, entitled to a distributive share of his estate at Tenbury during his life.

So it seems where the income of property given to several persons during their *joint lives*, is limited over on the death of the survivor, upon the death of one of them, the income (which would otherwise be undisposed of), will by implication, go to the survivors and survivor of them. *Townley v. Bolton*, 1 My. & K. 148; *M'Dermott v. Wallace*, 5 Beav. 142; *Moffat v. Burnie*, 23 L. J., Ch., 591; *Day v. Day*, 1 Kay, 703; sed vide *Grant v. Winbolt*, 23 L. J., Ch., 282; *Jones v. Randall*, 1 J. & W. 100; *Smith v. Oakes*, 14 Sim. 122.

It seems that where there is a bequest to persons of personal property, as a term of years, after the death of another, the latter will take an estate for life by implication. See *Roe d. Bendale v. Summerset*, 5 Burr. 2608, in which case the bequest over was to one of the testator's daughters, and therefore entitled as one of his next of kin, which seems to bring the case within the same principle as a devise over to the heir-at-law.

In *Hudleston v. Gouldsbury* (10 Beav. 547), a testator willed that certain property should be vested in such manner as his wife, with the advice of his executors, might consider most secure, and least liable to fluctuation or risk : and further that the principal sum of 3,000*l.* should be at the will and disposal of his wife *at the time of her death*, but the residue of the property over and above the 3,000*l.* he willed that his wife should distribute to his relations ; and he appointed his wife residuary legatee and executrix with three other persons. Lord Langdale, M. R., held, that the wife took the intermediate income as residuary legatee ; but his Lordship observed, "It is true the testator has not said a word about a life interest to his widow. It is, however, unnecessary to say, whether a life interest is or is not given to her by implication. I am much inclined to think it is." See also *Ramsden v. Hassard*, 3 Bro. C. C. 236 ; *Bird v. Hunsdon*, 2 Swanst. 342 ; *Blackwell v. Bull*, 1 Keen, 176 ; sed vide *Horton v. Horton*, Cro. Jac. 74, in which case, however, the implication may not have arisen in consequence of the appointment of executors, in whom at that time all the property vested absolutely, independently of the next of kin.

Where, however, under a power (in which there is a gift over in default of appointment), the donee appoints a sum to be paid at the decease of one of the objects of the power, that will not be a gift to him of a life interest in the sum by implication, but it will go as in default of appointment. See *Henderson v. Constable*, 5 Beav. 297, in which case the testatrix had a power of appointment over 2,500*l.*, and there was a gift over of the same in default of appointment, and to be paid with interest from the donee's death. The donee by her will appointed a *part* to her son William, and 1,630*l.* to other persons, and directed the said sums to be paid *at the decease of* William except the one left to him. Lord Langdale, however, observed, "I cannot follow the argument that there is a gift to William by implication I see no foundation for any such inference ; there is a gift to persons in default of appointment, and there must be a distinct appointment in order to defeat the gift over." See also *Wombwell v. Hanrott*, 14 Beav. 143.

Whether any Estate arises by Implication, upon a Person attaining a certain Qualification, by a Gift over, on his not attaining it.

Where there is a gift over to a stranger, upon a person, to whom a prior interest is given, dying under age (*Fitzhenry v. Bonner*, 2 Drew. 36), or before twenty-five or marriage without consent (*Malcolm v. O'Callaghan*, 2 Madd. 349), the latter will not take any estate by implication on attaining the prescribed age, or on marriage with consent. The contrary seems to be decided by *Newland v. Shephard* (2 P. Wms. 194), and *Goodright v. Hoskins* (9 East, 306) ; but Lord Brougham in *Davis v. Davis*, 1 Russ. & My.

645, reversing the decision of Sir J. Leach, M. R., observed with regard to those cases, that the former had been often questioned, and the latter had been rested by Lord Ellenborough on special grounds.

In *Atkinson v. Paice*, 1 Bro. C. C. 90, there was a bequest of stock to executors to be paid to a mother and daughter, and the longer liver of them during their lives, and then to the lawful issue of the daughter if she should have any, if not, in trust for R. Little, *until he shall come of age*, and there was a residuary bequest. It was held by Lord Thurlow, that by the words "till of age," the testator meant to give the fund to the child, and the trust given till then was only to point out the mode.

So in *Peat v. Powell*, 1 Ed. 479; Amb. 396,—there was a devise of the residue of the testator's real and personal estate to his executors in trust for his younger son *Giles*, *till he should attain twenty-one*, and then directed that the said trust should cease; Lord Keeper Henley said, "I am quite clear that *Giles* was intended by the testator to have the whole beneficial interest in the residue, and that the trust was meant only to continue during the minority. It is the same as if the testator had said, 'I give the residue of my estate to trustees, in trust for *Giles* till he attain twenty-one, and then to *Giles* and his heirs.'" See also *Tomkins v. Tomkins*, cited 1 Burr. 234.

The two last-mentioned cases seem scarcely to have been decided upon the principles laid down by Vaughan, C. J., in *Gardner v. Sheldon*, and they are quite inconsistent with the recent case of *Fitzhenry v. Bonner*, 2 Drew. 36: there a testator, after giving all his personal estate and effects to trustees, gave the yearly interest arising therefrom to his wife for her and his son's support, clothing and education, *until he should arrive at twenty-one*; if *he died under twenty-one*, then he gave all the interest of his Bank Stock to his wife for life, and at her death the whole of his property to his reputed daughter. It was held by Sir R. T. Kindersley, V. C., that the son did not take any estate by implication on his attaining twenty-one, but that there was an intestacy.

Estate Tail, when implied.

In examining this branch of the subject we will consider, first, those cases where wills have been made before, secondly, those which have been made after, the late Wills Act (1 Vict. c. 26) came into operation (1st January, 1838).

First, in wills not coming within the operation of the new Wills Act. Where an estate is given to a person indefinitely, or even expressly for life (*Langley v. Baldwin*, 1 Eq. Ca. Abr. 185; *Stanley v. Lennard*, 1 Eden, 87; *Attorney-General v. Sutton*, 3 Bro. P. C. 75; *Doe d. Bean v. Halley*, 8 T. R. 5; *Machell v. Weeding*, 8 Sim. 4; overruling upon this point *Bam-*

field v. Popham, 1 P. Wms. 54; Salk. 236), or to him and his heirs (*Holmes v. Meynel*, post, 532; *Forrest v. Whiteway*, 3 Exch. 367), if there be a limitation over upon his death in words importing a general failure of his issue, he will take by implication an estate tail.

And it must be remembered, that a devise over, whether express or implied, is essential, in order to raise an estate tail by implication. *Doe d. Cape v. Walker*, 2 Mann. & Gr. 113; and see *Newton v. Barnadine*, Moore, 127; *S. C. nom. Cosen's Case*, Owen, 29.

The principle upon which this rule of construction has obtained is this, that if the person, upon the failure of whose issue the estate is given over, were not to take an estate tail, the gift over, as it depends upon a general failure of his issue, and not a failure merely of issue living at his death, would be void as too remote; it has therefore by implication been inferred, that it was the intention of the testator to give an estate tail to the first taker, upon which (although he would have it in his power to bar such estate) the limitations over might depend.

Where, however, an estate is given to a person for life or in fee, with a limitation over on the event of his dying without issue *living at his death*, such person will not by implication have the prior estate converted into an estate tail. *Lethieullier v. Tracy*, 3 Atk. 785, 793.

As to what words import a general failure of issue, and what words a failure of issue at the death, see *Forth v. Chapman*, and note, post, 552.

Where a person to whom *no* estate is expressly given, and upon whose death without issue there is a devise over, stands in the relation of *heir-at-law* to the devisor, he will take an estate tail by implication. Thus in *Goodright v. Goodridge* (Willes, 369), where the testator, having devised his lands to his wife for life, proceeded as follows,—“and my will is, that if my son Richard (the elder) *die without heirs*, then my son John shall enjoy my lands,” it was held by the Court of Common Pleas that Richard took an estate tail by implication, the word “heirs” being construed as equivalent to “heirs of the body.” “That the heir’s estate,” said Willes, J., “may be turned into an estate tail by implication, though there is no express devise before to the heir, appears plainly from *Cosen’s Case* (Owen, 29), which, though very imperfectly stated, is clear enough as to this point. In that will there was no devise to the eldest son Richard, but there are these words, ‘If it please God to take to his mercy my son Richard before he hath issue, so that my lands shall descend to my son George before he shall be of the age of twenty-one, then my overseers shall have my land until George comes of that age.’ It was held by all the Justices, that Richard had only an estate tail, which is a much stronger case than the present, for in that case there is only an implication that George the second son should have

the estate in case Richard the eldest died without issue of his body; but here it is said so in express words." See also *S. C.* 7 Mod. 453; *Daintry v. Daintry*, 6 T. R. 307.

The principal case is a leading authority for the proposition, that where there is a gift over to a person who is not the heir, on the failure of the issue of any person or persons to whom no previous estate is given, the latter person or persons will not take any estate by implication. See also *Scrape v. Rhodes* (Com. Rep. 542), and *Doe v. Lucraft* (1 M. & Sc. 573; 8 Bing. 386), which must be considered as overruling *Tenny v. Agar* (12 East, 253), and *Romilly v. James* (6 Taunt. 263; 1 Marsh. 592). The result therefore would be, according to the principles already laid down, that the gift over after the general failure of issue would be void, as being too remote. In the principal case, indeed, Vaughan, C. J., was of a different opinion; but is it clear upon the present state of the authorities that the executory devise over to the nephew, on failure of the issue of the devisor's son and two daughters, would be void as too remote.

When Implication of an Estate Tail is prevented by the referential Construction.

In some cases, however, a devise over in default of issue has reference to some intervening class of issue; in which case it will not have the effect of conferring by implication an estate tail upon the ancestor, to whom property has been previously devised, either indefinitely, for life, or in fee.

It must, however, always be borne in mind, that in these cases there is a marked distinction between the mode of construing gifts of real, and gifts of personal estate, as the implication will much more readily arise, with regard to the former, than the latter. The reason is that by adopting the implication with regard to realty, an estate tail is conferred upon the first taker, upon which a remainder over can be limited. Whereas, if it were adopted with regard to personalty, it would not confer such interest, and, any gift over, would necessarily be void. The Courts, therefore, have felt disinclined to raise the implication with regard to personalty.

It will be convenient therefore, on account of this distinction, to consider the cases relating to *real* estate, and those relating to *personal* estate separately.

With regard to *real estate*, where after a devise to a single child as a son (*Doe v. Charlton*, 1 Scott, N. R. 290; 1 Mann. & Gr. 429; *Boydell v. Golithly*, 14 Sim. 327; *Ashburner v. Wilson*, 17 Sim. 204), or children (*Doe d. Comberbach v. Perryn*, 3 T. R. 484; *Foster v. Hayes*, 2 Ell. & Bl. 27; *Doe d. Liversage v. Vaughan*, 1 D. & Ry. 52; 5 B. & Ald. 464; *Doe d.*

Tooley v. Gunniss, 4 Taunt. 313; *Ashley v. Ashley*, 6 Sim. 358; *Rex v. Marquis of Stafford*, 7 East, 521), sons (*Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320; *Foster v. Romney*, 11 East, 594; *Bridger v. Ramsey*, 10 Hare, 320; *Bevan v. White*, 7 Ir. Eq. Rep. 473; *Purcell v. Purcell*, 2 Dru. & Warr. 219, n.), or daughters (*Den d. Briddon v. Page*, 3 T. R. 87, n.; 11 East, 603, n.), whether in fee (*Foster v. Hayes*, 2 Ell. & Bl. 27), tail male (*Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320), or for life (*Doe d. Liversage v. Vaughan*, 1 D. & Ry. 52; 5 B. & Ald. 464; *Foster v. Romney*, 11 East, 594; *Goodright d. Lloyd v. Jones*, 4 Mau. & Sel. 88), if there be a gift over in default (*Foster v. Hayes*, 2 Ell. & Bl. 27), or failure, or want of *such* issue (*Doe d. Phipps v. Lord Mulgrave*, 5 T. R. 320; *Ryan v. Comley*, 1 Ll. & G. t. Sugd. 7; *Carter v. Bentall*, 2 Beav. 551), or words equivalent to "*such*" issue, as "*issue as aforesaid*" (*Walker v. Petchell*, 1 C. B. 652); the words by which the gift over is conferred, will be construed as merely referential, and will not operate either by enlarging or cutting down any preceding estate to an estate tail. Sed vide *Evans d. Brook v. Astley*, 3 Burr. 1570; *Lomax v. Holmden*, 1 Ves. 290, which cases, however, may probably be considered as overruled; and see and consider *Doe d. Harris v. Taylor*, 10 Q. B. 718.

Moreover, where there is a gift over by words signifying a failure of issue, even without the word "*such*" or any equivalent word, coming after a devise to *children* either in fee (*Goodright d. Docking v. Dunham*, Doug. 264; *Ginger d. White v. White*, Willes, 348; *Malcolm v. Taylor*, 2 R. & My. 416; *Cormack v. Copous*, 17 Beav. 397; and see *Doe v. Selby*, 2 Barn. & Cress. 926) or in tail (*Baker v. Tucker*, 3 H. L. Cas. 106; *Goymour v. Pigge*, 7 Beav. 475), the words will be considered merely as referential.

It may be here mentioned that it has been held that a gift over "without leaving issue" has been construed to refer to issue before mentioned (*Goymour v. Pigge*, 7 Beav. 475); but as with regard to *real* estates they refer to a general failure of issue at any time (*Doe d. Todd v. Duesbury*, 8 Mees. & W. 514; sed vide contra *Tarback v. Tarback*, 4 L. J., Ch., N. S., 129) a gift over will be void as too remote. See *Goodright v. Dunham*, Doug. 264.

Where, however, from some other expressions or circumstances apparent on the face of the will, it appears that the words "without leaving issue," are not to receive the referential construction, they will be construed as meaning a general failure of issue living at the death. (*Hutchinson v. Stephens*, 1 Keen, 240; *Ex parte Hooper*, 1 Drew. 264.)

Where, after a devise of real estate to the ancestor, there is a limitation to only a *limited number* of a class, as to one or more son or sons only, followed by a gift over in default of issue, the words importing a

failure of issue will not receive a referential construction and the ancestor will take by implication an estate tail. Suppose, for instance, after a devise to the ancestor for life, there be a limitation to his eldest son only for life or in tail (*Stanley v. Lennard*, 1 Eden, 87), or to his eldest surviving son (*Key v. Key*, 4 De Gex, Mac. & Gord. 73; and see *Wight v. Leigh*, 15 Ves. 564), or to his first and so on to the sixth son only, in tail (*Langlely v. Baldwin*, 1 Eq. Ca. Abr. 185, pl. 29; 1 P. Wms. 759 cited) or to his first and second sons in tail (*Attorney-General v. Sutton*, 1 P. Wms. 754; 3 Bro. P. C. 75, Toml. Ed.; and see *Evans d. Brooke v. Astley*, 3 Burr. 1570; *Doe d. Bean v. Halley*, 8 T. R. 5; *Monypenny v. Dering*, 2 De Gex, Mac. & Gord. 171, 172), followed by a limitation over in default of issue, or issue male, the ancestor will take an estate tail by implication. In such cases, however, the estate tail given by implication to the ancestor is expectant upon an express estate tail given to his sons. *Doe d. Bean v. Halley*, 8 T. R. 5.

The rule which governs these cases is well stated by Lord Cottenham in *Ellicombe v. Gompertz*, 3 My. & Cr. 151, viz. that "where provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of that class, if it be clear that the whole of the class were not to take, the gift over, though made to depend on the failure of the whole class, will be construed to take place upon the failure of that description of the class, who were to take; and, on the other hand, if it appears that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit, in the best way the law will admit, to the whole class." See also *Roe d. Ren v. Lucraft*, 1 M. & Sc. 573; 8 Bing. 386; and the remarks of Sir James Wigram, V. C., in *Eno v. Eno*, 6 Hare, 178; and *Bryan v. Mansion*, 5 De G. & Sm. 737.

And where, after a life interest in the parent, all the children take *only life interests*, followed by a limitation over in default of issue, an estate tail by implication will be more readily raised in the ancestor than where the children take estates of inheritance; the estate tail in the ancestor nevertheless being expectant upon the express life interests in the children. *Wight v. Leigh*, 15 Ves. 564; *Parr v. Swindels*, 4 Russ. 283; *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 3 Ad. & Ell. 340; *Bennett v. Lowe*, 5 M. & P. 485; 7 Bing. 535; *Doe v. Hopkinson*, 5 Q. B. 223.

With regard to *personal* estate, if, after a devise to the parent for life, followed by a limitation to his "children" (*Doe d. Lyde v. Lyde*, 1 T. R. 593; *Attorney-General v. Bayley*, 2 Bro. C. C. 553; *Vandergucht v. Blake*, 2 Ves. jun. 534; *Robinson v. Hunt*, 4 Beav. 450), or even to a limited number of them (*Salkeld v. Vernon*, 1 Eden, 64; *Cormack v. Copous*, 17 Beav. 397), there be a bequest over if the parent died *without issue*,

the latter words will be deemed to refer to the issue mentioned before; and the consequence will be, that the life interest of the parent will not be enlarged to an absolute interest by implication. (And see *Farthing v. Allen*, 2 Madd. 310.) A fortiori, where the prior gift is to "issue" (*Leeming v. Sherratt*, 2 Hare, 14; sed vide *Andree v. Ward*, 1 Russ. 260), or the gift over is "in default of such issue" (*Maddox v. Staines*, 2 P. Wms. 421; 3 Bro. P. C. 108, Toml. Ed.; *Stanley v. Leigh*, 2 P. Wms. 686).

In the case of *Campbell v. Harding* (2 Russ. & My. 390), a testator by his will gave to Caroline, described as his natural daughter, a sum of stock and his house and land at a particular place; but in case of her death *without lawful issue*, the money was to be equally divided between his nephews and nieces who *might be living at the time*, and the land to two nephews. And there was a direction, that if Caroline married, the property was to be solely settled *upon herself and children*, and in no way charged or alienated. It was held by Lord Brougham, C., affirming the decision of Sir L. Shadwell, V. C., that Caroline took an absolute interest in the stock. This decision was afterwards affirmed by the House of Lords. See *S. C. nom. Candy v. Campbell*, 8 Bligh, N. S., 469; 2 C. & F. 421.

Secondly, in wills coming within the operation of the new Wills Act, it must be remembered, that by the 29th section it is enacted, "That in any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without having issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a *want or failure of issue in the lifetime or at the time of the death of such person*, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: provided, that this act shall not extend to cases where such words as afore-said import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue." See *Monypenny v. Dering*, 7 Hare, 588.

There will be no gift by implication to children, where, after a bequest to a person, there is a limitation over on his death without having or leaving any child or children, and the construction is the same in the case of the bequest of a pecuniary legacy (*Andree v. Ward*, 1 Russ. 260; *Greene v. Ward*, Ib. 262; *Ranelagh v. Ranelagh*, 12 Beav. 200; *Cooper v. Pitcher*, 4 Hare, 485), and of a residue. Thus in the recent case of *Lee v. Bush*, 14 Beav. 459, the testatrix bequeathed her residuary personal estate to

trustees, upon trust for J. Lee, but if he should die in her lifetime without leaving any child or children him surviving, then she directed that the residue of her trust-monies should be in trust for C. Lee, it was held by Sir John Romilly, M. R., that the children of John Lee took nothing by implication. "I think," said his Honor, "this case is expressly decided by the authorities, and which render it impossible for me to hold that the children take anything by implication. I cannot give to the same words a different construction when used in relation to a residue from that which I should when applied to a simple legacy. Here the testatrix knew how to express a gift to the children, for she has done it in the case of the real estate. It is possible that some words have been left out, but it is not the province of the Court to supply them, and thus make a will for a testator." This case was affirmed on appeal by the Lords Justices, 2 De Gex, Mac. & Gord. 810, where Lord Cranworth doubts the authority of *Ex parte Rogers*, 2 Madd. 449. See also *Weakley v. Rugg*, 7 T. R. 322; *Doe v. Wetton*, 2 Bos. & Pul. 324.

Cross Remainders in Tail, when implied.

"When lands are given in undivided shares, to two or more, for particular estates, so as that, upon the determination of the particular estates, in any of those shares, they remain over to the other grantees, and the reversioner or remainderman is not let in till the determination of all the particular estates, the grantees take their original shares as tenants in common, and the remainders limited among them on the failure of the particular estates, are known by the appellation of cross remainders." Butler's Note on Co. Litt. 195 a.

These remainders may be raised both by deed and will. In deeds, however, when the limitations are legal, they can only be created by express words (see *Cole v. Livingston*, 1 Vent. 224; *Doe v. Dorvell*, 5 T. R. 521); but in wills it has long been decided that cross remainders may be raised by implication. Thus in *Holmes v. Meynel*, T. Raym. 452; 1 T. Jones, 172, a leading case upon the subject, the testator devised lands unto his two daughters Elizabeth and Ann, and their heirs, equally to be divided betwixt them, and in case they happened to die without issue, then he devised all the said lands to Francis Meynel. On the death of Ann without issue, it was held by the Court of King's Bench that Elizabeth and Ann were tenants in common in tail, with cross remainders between them. "I conceive," said the Chief Justice, "Francis takes nothing upon the death of Ann, but that her part remains to her sister by way of a cross remainder. I take notice, that the main design and intent of the testator was, that, in the first place, he would take care of his own children, and then look after the continuance of

his own name and family. . . . That this was the intent appears by the words of the will,—1. ‘In case they die without issue,’ i. e. both of them, ‘tis not they or either of them; 2. ‘All the said lands’ (which intends both parts, and not a moiety), and *all* cannot pass till both are dead without issue. And if the testator had been asked what he meant by the lands going to his nephew after the death of his daughters without issue, he would have answered, that he should have the lands when *both* of his daughters should be dead without issue, and not before. . . . Had the testator set forth at length the cross remainders, this question had been out of doubt. Now, he being *inops consilii*, we ought by construction to make his words answer his intent, appearing in other parts of the will, as near as may be.” See also *Anon.*, Dyer, 303 b. In *Forrest v. Whiteway*, 3 Exch. 367, an estate in fee was cut down to an estate tail, by a gift over in default of issue, in the same mode, as in *Holmes v. Meynel*. See also *Stanhouse v. Gaskell* (17 Jur. 157). And the implication will arise where the gift over is in default of “issue males.” *Doe d. Southouse v. Jenkins*, 3 M. & P. 59; 5 Bing. 469.

Cross remainders will also be implied, where, after a gift to several as tenants in common in tail, the testator adds “*with remainder to*” another person (*Doe d. Burden v. Burville*, 2 East, 47, n.); but not, it seems, by the word “*reversion.*” *Pery v. White*, Cowp. 777.

Amongst other cases where cross remainders have been implied, see *Wright v. Holford*, Cowp. 81; *S. C.* nom. *Wright v. Lord Cudogan*, 2 Eden, 239; *S. C.* nom. *Wright v. Englefield*, Amb. 468; *Phipard v. Mansfield*, Cowp. 797; *Atherton v. Pye*, 4 T. R. 710; *Watson v. Foxon*, 2 East, 36.

It seems to have been laid down in some of the cases following *Gilbert v. Witty* (Cro. Jac. 655) that cross remainders would not be implied between more than *two* persons (*Cole v. Livingston*, 1 Vent. 224). The ground of the distinction appears to have been the supposition, that uncertainty and confusion would arise where there was an implication of cross remainders among three or more; but, as is observed in *Holmes v. Meynel*, “the intent of the devisor which ought to govern the devise, is as clearly manifest where the devise is to three as to two, and the pregnancy of the implication might with little labour be explained by express limitations” (T. Jones, 173). In subsequent cases, however, a different rule was laid down, which is thus expressed by Lord Mansfield, “that wherever cross remainders are to be raised by implication between *two*, and no more, the *presumption* is in favour of cross remainders; where they are to be raised between *more than two*, there the presumption is against cross remainders: but that presumption may be answered by circumstances of plain and manifest intention either way.” *Pery v. White*, Cowp. 780. See and con-

sider *Phippard v. Mansfield*, Ib. 800; *Marryat v. Townly*, 1 Ves. 104; *Staunton v. Peck*, 2 Cox, 8; *Atherton v. Pye*, 4 T. R. 713; *Doe v. Cooper*, 1 East, 236; *Watson v. Foxon*, 2 East, 40; *Doe d. Burden v. Burville*, 2 East, 48, n.; *Green v. Stephens*, 17 Ves. 74.

In the case of *executory trusts* it is clear that cross remainders may be implied, although there may have been an express direction to insert cross remainders among another class of objects, or even an express cross limitation among the *same* objects. Thus in *Burnaby v. Griffin*, 3 Ves. 266, where a testatrix devised real estates to trustees upon trust to pay a moiety of the rents to her sister Elizabeth for life, and after her decease upon trust to *convey, settle and assure* one moiety of the said real estate unto and upon all and every the daughter and daughters of the body of her said sister, equally to be divided between them, if more than one, share and share alike, to hold as tenants in common in tail general, *with cross remainders* for the benefit of such daughters; and if all but one should die without issue, or there should be but one such daughter, then to the use of such only daughter in tail general; remainder to all and every the younger son and sons of the body of her said sister successively in tail male; remainder to the first, eldest and only son of her said sister in tail general; and as to the remaining moiety or half part of the rents of the said real estates upon trust to pay the same to her niece Catherine for life; with the same limitations to her daughters and sons as to the children of her sister; but if her said niece should depart this life without having any issue of her body living at her decease, the testatrix directed that her said sister should receive the *rents of the said real estate for her life; and in case her said sister and her niece should die without issue of their respective bodies, or all such issue should die without issue*, she then gave her said real estate to four cousins, or such of them as should be then living, in tail general as tenants in common. Lord Hardwicke, by a decree made 27th January, 1745, directed that the real estate should be conveyed to the uses and upon the trusts of the will; and in settling the conveyance cross remainders were to be inserted between the sister and niece of the respective moieties devised to them *upon failure of issue of them severally*. See also *Horne v. Barton*, Coop. 257; 19 Ves. 398.

Although the authorities are conflicting, it seems that in ordinary devises the insertion of express cross limitations will prevent their implication among other objects. In *Clache's Case*, cited by Vaughan, C. J. (ante, p. 514), (where there was no executory trust,) it was held that express cross remainders would exclude cross remainders by implication. The authority, however, of that case has been impugned by Sir James Wigram, V. C., in *Vanderplank v. King* (3 Hare, 20), where his Honor says, that

after having attentively read the cases the conclusion he had formed was, "that any Court would, in the present day, with the disposition of construction which now prevails, carry out established principles, wherever it was certain that by so doing the intention of the testator was effectuated; and that any Court would now hold that an express gift of cross remainders in one event did not preclude the Court from giving cross remainders by implication in another, either case being clearly within the scope of the reasoning upon which Courts have proceeded in implying cross remainders." However, in *Rabbeth v. Squire* (19 Beav. 77), where real and personal property was devised and bequeathed to trustees upon trust as to one-fifth for each of the testator's five children for life, and after his or her decease, for his or her children, which he or she should leave at his or her decease, and if he or she should leave none, in trust for the other children for life, and after the death of *all* the children, in trust as to the whole for all the grandchildren of the testator, share and share alike. One child died leaving a child who died before the last of the testator's children. It was held by Sir J. Romilly, M. R., that such child only took an estate for his own life, and that one-fifth was undisposed of until the death of the surviving child, and that cross remainders in the events which had happened were not to be implied. "It was contended," said his Honor, "that cross remainders are to be implied, and that, although the testator has in his will directed cross remainders in another event, this does not prevent this implication from arising in the events which have occurred, and the case of *Vanderplank v. King* (3 Hare, 1), before Sir James Wigram is referred to as an authority for this proposition." His Honor, after observing that he could not accede to that view of the case, and that in holding that cross remainders could not be implied, he did not dispute the authority of *Vanderplank v. King*, which he considered distinguishable from the case before him, added, "My opinion is, that this is a case where the doctrine of *Clache's Case* (Dy. 330 b, ante, p. 514) applies, and that cross remainders cannot be implied in the event which has occurred."

At one time where there was a limitation to persons, "and the heirs of their *respective* bodies" (*Comber v. Hill*, 2 Stra. 969; *Williams v. Browne*, Ib. 996), or "to the *several* and *respective* issues of their bodies" (*Davenport v. Oldis*, 1 Atk. 579), and there was a gift over "*in default of such issue*," it was held that the use of the word "*respective*" was sufficient to rebut the implication of cross remainders (see also *Wright v. Holford*, Cowp. 34; *Pery v. White*, Ib. 777; *Phipard v. Mansfield*, Ib. 797; *Burden v. Burville*, 2 East, 48, n.); but the distinction taken in those cases has since been clearly overruled. See *Watson v. Foxon*, 2 East, 36; *Doe d. Gorges v. Webb*, 1 Taunt. 234; *Green v. Stephens*, 12 Ves. 419; 17 Ves. 64.

Cross remainders will also be implied among several stocks or branches of issue. *Roe d. Wren v. Clayton*, 6 East, 628; *Doe d. Gorges v. Webb*, 1 Taunt. 234.

The reasoning which has been considered sufficient to justify the Court in giving cross remainders by implication will apply, whether you suppose or not that one of the branches took an estate tail, and that as to the other, the first taker took for life, and his descendants took estates in tail. Per Wigram, V. C., in *Vanderplank v. King*, 3 Hare, 21; see also *Ashley v. Ashley*, 6 Sim. 358; *Pearce v. Edmeades*, 3 Y. & Coll. Ex. Ca. 246; sed vide *Ewington v. Fenn*, 16 Jur. 398.

Cross Remainders in the Case of Executory Trusts.

Cross remainders will be very readily implied in executory trusts; as, for instance, in the case of marriage articles, and in the case of wills where a conveyance or settlement is directed to be made. Thus where, in marriage articles, the words "heirs of the body," or "issue," are held to indicate an intention that the issue of the marriage should take as purchasers, a settlement will be decreed in favour of daughters as well as sons, viz. on first and other sons successively in tail, with remainder to the daughters as tenants in common in tail, with cross remainders between them. *Nandirk v. Wilkes*, Gilb. Eq. Rep. 114; *S. C.* 1 Eq. Ca. Abr. 393, pl. 5; *Burton v. Hastings*, Gilb. Eq. Rep. 113; *S. C.* 1 Eq. Ca. Abr. 393; *Hart v. Middlehurst*, 3 Atk. 371; *Maguire v. Scully*, 2 Hog. 113; *S. C.* 1 Beat. 370.

So, likewise, where there is an agreement to settle property on "the heirs female" of the marriage, a settlement will be made upon them in tail, with cross remainders between them. *West v. Errissey*, 2 P. Wms. 349; Com. Rep. 412; 1 Bro. P. C. 225, Toml. Ed. Sed vide *Powell v. Price*, 2 P. Wms. 535.

As to the implication of cross remainders in executory trusts in wills, see *Lord Glenorchy v. Bosville*, Ca. t. Talb. 3; 1 L. Cas. Eq. 1; *Bastard v. Proby*, 2 Cox, 6; *Trevor v. Trevor*, 13 Sim. 108; 1 H. L. Ca. 239.

As to cross Executory Limitations among Persons taking an absolute Interest.

It seems now to be settled in opposition to some of the earlier authorities (*Scott v. Bargeman*, 2 P. Wms. 68; *Mackell v. Winter*, 3 Ves. 536, overruling the decision of Lord Alvanley, Ib. 236; *Beauman v. Stock*, 2 Ball & B. 406), that cross executory limitations, after an absolute gift of real or personal estate, with a limitation over in certain events, as death under a particular age, will not now be implied. *Shey v. Barnes*, 3 Mer. 335;

Turner v. Frederick, 5 Sim. 466; *Templeman v. Warrington*, 13 Sim. 267; *Cohen v. Waley*, 15 Sim. 318; *Mair v. Quilter*, 2 Y. & Coll. C. C. 465; *Baxter v. Losh*, 14 Beav. 612.

Whether Implication of a Gift of an Equitable Estate arises coextensive with Legal Interest.

As an equitable interest is not necessarily coextensive with the legal interest, where there are various kinds of property vested in trustees, and in declaring the trusts, some of them are omitted, whatever may have been the probable intention of the testator, no implication will arise, by which an equitable interest is conferred in the property omitted, upon those taking an equitable interest in the property expressly included in the trust. See *Jackson v. Noble*, 2 Keen, 590. There the testator devised and bequeathed freeholds, leaseholds, copyholds and 1,000*l.* stock, to trustees, to hold "the said last-mentioned freehold and leasehold messuages, tenements, estates and premises," and the 1,000*l.*, upon trust for his daughter. It was held by Lord Langdale, M. R., that the daughter took no interest in the copyholds which descended to the customary heir. See also *Stubbs v. Sargon*, 2 Keen, 255; 3 My. & Cr. 507.

Estates, when arising by Implication from Recitals.

Where a testator states or recites in his will, in clear and intelligible terms, that he has made a particular disposition, and it appears from the rest of the will that he is under the impression that he has made such disposition, it may be held by implication to be well made. Thus in *Bibin v. Walker* (Amb. 661), where the testator gave one moiety of his leasehold estates to his niece E. Y., and if she should die before twenty-one, then to G. S., and in case he should die before a certain period, then to his sister Y., and after her death to A. He then proceeds, "*And my further will is, in case A. shall die without any issue, and E. Y. and G. S. shall be then living, or either of them, then that the said moiety or half part of his said leaseholds before given to the said A. shall go to E. Y. and the said G. S.*" Sir Thomas Sewell, M. R., was clearly of opinion, first, that the latter clause, being a contingent disposition of a moiety to E. Y. and G. S., could not relate to the moiety before devised, but must be understood to mean the other moiety. The manner in which it was given was inconsistent with the disposition of the first moiety, by which A. was not to take until after the death of E. Y. and G. S. Secondly, that the Court would imply a gift of the other moiety to A. and her issue, with contingent limitations over. There could be no doubt of intention, and the words of gift being omitted by

mistake, the Court would supply them. See also *Poulson v. Wellington*, 2 P. Wms. 533; *Wilson v. Piggott*, 2 Ves. jun. 351.

So where a testator, by a codicil, bequeathed to a person "500*l.* in addition to the 1,500*l.* which he had before bequeathed to him," the testator having previously bequeathed two legacies only of 500*l.* and 500*l.* each, it was held by Lord Langdale, M. R., that by implication the legatee was entitled to 2,000*l.* *Jordan v. Fortescue*, 10 Beav. 259. See also *Hayes d. Foorde v. Foorde*, 2 Wm. Black. 698.

It seems, however, that a previous legacy of a larger amount will not be cut down by an erroneous recital in a subsequent part of the will (*Mann v. Fuller*, 1 Kay, 624) or a codicil. See *Gordon v. Hoffman* (7 Sim. 29), where a testator, by codicil, gave to his son 4,000*l.* in addition to the legacy of 2,000*l.* given by his will, having in fact given him 3,000*l.* by his will, it was held that the son was entitled to the 3,000*l.* and 4,000*l.*

Where it appears to be the intention of a testator to give so much, either in the shape of an annuity or legacy, which will, with another annuity or legacy which such person has, make up a certain amount, a miscalculation of the former annuity or legacy will not defeat the intention. Thus in *Milner v. Milner* (1 Ves. 106), the testator bequeathed a legacy as follows: "I give to my daughter Mary 3,500*l.*, which, with the 6,000*l.* she is entitled to by my marriage settlement and 500*l.* from her father-in-law, make up 10,000*l.*, which is the sum I design she shall have for her fortune. It happened that the daughter was only entitled to 5,000*l.* by the settlement. It was however held by Lord Hardwicke, C., that she was entitled to have 4,500*l.* to make up the 10,000*l.* "Though," said his Lordship, "it is true, that in strictness, the words in the conclusion are not legatory, yet they must be complied with, as they discover the ultimate end which the testator had in view. In support of this some authorities may be cited, Swin. part 7, cap. 5, sect. 13 (Errors in Legacies); that where the meaning of the testator is plain, it shall prevail against the words, although contrary, whether the error in the question be more or less. Of which opinion was Baldus, an author of greater weight in the civil law than others, who were of a contrary opinion. To the same effect is Godol. part 3, p. 447. Both these opinions are founded on the text in the Digest, 'De errore quantitatis legati,' and the comment thereon, and Cujacius, tom. 2, p. 818; Socini Concilium, 98, 163." *Trevor v. Trevor*, 5 Russ. 42; *Ouseley v. Anstruther*, 10 Beav. 459; and see *Matthews v. Maude*, 1 Russ. & My. 397: sed vide *Frederick v. Hall*, 1 Ves. jun. 396.

So an estate has been held to go to a person whom the testator termed his heir. Thus in *Tilly v. Collyer* (3 Keb. 589), the testator, having issue three daughters, Susan, Ann and Elizabeth, devised to his wife all his freehold wheresoever, "until Susan my heir come to twenty-one, paying to

the heir 10s. during the term, and to the rest, after fifteen years old, 20s. apiece, and the heir to pay Ann and Elizabeth 100l. apiece, 40l. at the decease of the wife, &c. And if Susan my heir die without heir before twenty-one, that the lands descend and fall to Ann, then Ann to pay to Elizabeth," &c. It was argued on behalf of a son of Elizabeth, that Susan took nothing by the devise by implication, there being no express devise to her. On behalf of Susan it was contended, that she was the sole heir, and that it was all one to devise to the heir, as for the testator to make a stranger heir of his land, and that Susan was not sole heir, unless made so by the intent of the will, which six times calls the eldest daughter his "heir;" otherwise Ann, the younger, would have equal shares in the land. Hale, C. J., said the testator was mistaken in his intent that the eldest daughter was his heir, but intended his lands should go according to that mistake; also she that was called heir was to pay the portions to the younger, and no provision was made for the elder daughter. . . . Albeit there was no express devise to Susan, yet she being his heir, this was sufficient to exclude the rest and to make her sole heir. See also *Taylor v. Web*, Sty. 301; *Jackson v. Craig*, 15 Jur. 811.

A mere mistake in a recital, either of what has gone before in the same instrument (*Smith v. Fitzgerald*, 3 V. & B. 2; *Philipps v. Chamberlaine*, 4 Ves. 51), or of a will, by a codicil, will not revoke a former clear gift, and confer an estate upon another person. Thus in *Sherratt v. Oakley*, 7 T. R. 492, the testator by his will bequeathed to his wife (besides some other legacies), a leasehold estate at *Northwood* for her life, "and as for his leasehold estate at *Wrentnall*, and also his estate at *Northwood* after his wife's death," he gave the same as to one moiety to W., and as to the other to G. By his codicil the testator directed, that the bequests made to his wife by his will should be in full of all demands to which she should be entitled in or out of his real or personal estate, *except the estate for life of his wife and her assigns to the premises at Wrentnall aforesaid*, anything in his foregoing will to the contrary thereof contained in anywise notwithstanding. Grose, J. said, "the testator did not mean to give his wife anything by the codicil; his intention was to prevent her claiming dower or thirds, as he supposed she would be entitled to them without some such restriction; and in effecting this he used the word '*Wrentnall*,' for '*Northwood*' in the recital of the codicil." See also *Vaughan v. Foakes*, 1 Keen, 58.

A devise, however, in ambiguous terms, may be explained and controlled by a subsequent recital of it in clearer language, *Darley v. Martin*, 13 C. B. 683; and see 10 C. & F. 17.

Where, however, the testator says that only which amounts to a declaration that he supposes that a party who is referred to, has an interest inde-

pendent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication. Thus in *Wright v. Wyvell*, 2 Vent. 56, the testator made his will as follows:—"As concerning my personal estate. First, I give and bequeath unto Ann my wife, the sum of 600*l.* to be paid unto W. W., for the full payment of lands lately purchased 'of him, and is already estated in part of a jointure to Ann my said wife during her natural life, being of the value of 67*l.* per annum; that of Wiskow, York and Malton, the lands and tenements there amounting to the yearly value of 63*l.*, in all 130*l.*, which being also estated upon my wife is in full of her jointure." No settlement of the premises or of any part of them had been upon his wife. It was held by the Court of King's Bench (dissentiente Powell, J.), that the wife took no estate by implication, inasmuch as it appeared that the testator thought his wife had the land; but it appeared that he did not intend to devise anything by the will, for he mentions, "that she was estated in it before," and in the case of implicit devises there is no reference to any act that should have conveyed the land to the devisee before; but in such cases the will passes the land by construction and implication: moreover the devise was introduced with this clause, as to the disposing of my personal estate. And throughout the will the testator gave only personal things. But Powell, J., relied upon the case in Mo. 31, where a man made a will in this manner:—"I have made a lease to J. S. paying but 10*s.* rent," and this was held a good lease by the will; but the Court thought that case was of little authority.

Upon the same principle in *Adams v. Adams*, 1 Hare, 537, where there was a devise and bequest of real and personal estate upon trust, for the children of the testator, *subject to the dower and thirds at common law of his wife*, followed by a direction to apply the rents, issues and profits, *after deducting the dower and thirds of his wife*, to the maintenance of his children, it was held by Sir J. Wigram, V. C., that there was not, by implication, a gift of any interest in the estate to the wife. See also *Right v. Hamond*, 1 Stra. 427; Com. Rep. 232; *Ralph v. Watson*, 9 L. J., N. S., Ch., 328; *Doolan v. Smith*, 3 J. & L. 547.

The distinction between the cases where the testator makes an erroneous recital, under an impression that he has made a previous disposition by his will, and those cases where he recites that the party referred to has an interest independent of the will, is well laid down by Vice-Chancellor Wigram. "The distinction," says his Honor, "between the two cases is marked and obvious. In the former the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as it is expressed by Mr. Jarman, 'such recitals do not in general amount to a devise; for as the testator evidently conceives that the person referred to possesses a

title independently of his own, he does not intend to make an actual disposition in favour of such person.'” *Adams v. Adams*, 1 Hare, 541.

So, likewise, a devise by implication will not arise from a mere recital of an erroneous conception of right. Thus in *Dashwood v. Peyton*, 18 Ves. 27, the testator, after reciting that he was seised or entitled for life, under the will of his uncle, to the advowson of the rectory of D., with remainder to his eldest son in tail male, with divers remainders over, “subject to a direction in the said will that my brother J. D. should be presented to the said rectory when it shall next become vacant, which it is my wish may be complied with, and I do hereby declare it to be my desire and earnest wish, that in case, upon the vacancy of the said living, the said J. D. shall not be then living, or shall decline to accept of the said presentation, or in case the said rectory shall again become vacant after the said J. D. shall have been presented to and accepted the said presentation, then and in either of such events my son A. P. may be presented.” It turned out that J. D. had no claim under the will of the testator’s uncle, the event on which he was entitled under that will not having taken place. The point which arose for the determination of the Court was, whether the recital in the will was sufficient to show an intention of giving J. D. such an interest in the property of other persons, upon whom benefits had been conferred by the will, as to put them to their election. Lord Eldon held that it was not sufficient. “In all the cases,” said his Lordship, “stated of devises by implication, the party, upon whose will the question arose, had the estate to give by the effect of his own will. That certainly makes some difference. A devise to the heir-at-law of the devisor after the death of his wife raises a necessary implication, that the wife shall take for her life, as the estate must go to some one in the interval; but from the devise by one man of another man’s estate after the death of the devisor’s wife, there is no implication in her favour.” See also *Doe d. Vessey v. Wilkinson*, 2 T. R. 209; *Smith v. Maitland*, 1 Ves. jun. 362.

As to gifts implied by powers of distribution and selection amongst certain objects, see *Harding v. Glyn*, 2 L. Cas. Eq. 685.

WILD'S CASE (a).

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Hil. 41 Eliz. In the King's Bench.

[REPORTED 6 Co. 16 b.]

RULE IN WILD'S CASE.]—*A devise to B. and his children or issues, B. having no issue at the time of the devise, gives him an estate tail; but if he has issue at the time, B. and his children take joint estates for life.*

Devise to A. for life, remainder to B. and the heirs of his body, remainder to W. and his wife, and after their decease to their children; W. and his wife then having issue a son and daughter:—Held that W. and his wife had but an estate for life; and although they had no child at the time of the devise, yet every child which they might have afterwards would take by way of remainder.

HIL. 37 Eliz., in *ejectione firmæ*, between Richardson and Yardly in the King's Bench, on not guilty pleaded, the jury gave a special verdict to this effect. Land was devised to A. for life, the remainder to B. and the heirs of his body, the remainder to "Rowland Wild" and his wife, and after their decease to "their children," Rowland and his wife, then having issue a son and daughter; and afterwards the devisor died, and after his decease A. died, B. died without issue, Rowland and his wife died, and the son had issue a daughter, and died; if this daughter should have the land or not, was the question; and it consisted only upon the consideration what estate (b) Rowland Wild and his wife had, viz. if they had an estate tail, or an estate for life, with remainder to

(a) *S. C. nom. Richardson v. Yardley*, Moore, 397, pl. 519; *Anon.*, Gouldsb. 139, pl. 47.

(b) *Bridg.* 85, 86; *Cro. Eliz.* 10, 121; *Cro. Jac.* 416; 1 *Vent.* 227; 1 *Bulst.* 62, 220; 3 *Keb.* 42, 95, 97; *Lane*, 57.

their children for life ; and the case for difficulty was argued before all the Judges of England ; and it was resolved, that Rowland and his wife had but an estate for life with remainder to their children for life, and no estate tail.

And in the (b) construction of this will, the Judges did first consider the judgment of the common law, if the conveyance had been made by the deviser in his life ; and, second, the reason and cause that the judgment shall not be according to the rule of law ; and it was resolved, without question, that at the common law they had but an estate for life, the remainder to their children for life. Then what shall be the reason and cause to give them an estate tail by construction in this case ? It will be answered, the intent of the testator. But it was resolved, that such (c) intent ought to be manifest and certain, and not obscure or doubtful ; for at the (d) common law lands were not devisable (but only by custom, and that in ancient cities and boroughs, of houses and small things) ; but by the statutes of 32 and 34 H. 8, all lands according to the purview thereof are devisable, which statutes were made to the great disadvantage (e) of heirs at the common law by wills for the most part made in extremity of sickness, and that utterly against the rule and reason also of the common law ; for the ancient common law did favour him, who the common law made heir, because he was to sit in the seat of his ancestor, and to serve the King and commonwealth, in as good estate as his ancestor did. And therefore it appears by Glanville, who was Chief Justice in the time of H. 2, lib. 7, cap. 1, fol. 44, that every freeman, without the assent of his heir, might dispose of a reasonable part of his lands with his daughter in frankmarriage, for the advancement of his blood, or to any servant in recompense of his service, or in frankalmoigne to any religious house to have divine prayers made for him. But all this he ought to do in (f) health, and not in extremity of sickness, to the end that such gifts should not be made more out of rage and fury of mind, than of good discretion, and so his gift might exceed measure. But if

(b) Cart. 5 ; Cro. Eliz. 696.

(c) Cro. Eliz. 696, 742 ; 2 Sid. 26 ; Cro. Jac. 416 ; Cro. Car. 369.

(d) Litt. s. 167 ; 1 Roll. 608 ; Co. Litt.

(e) Co. Litt. 111 b ; Cro. Car. 369, 450 ; Vaugh. 262, 267, 268 ; 1 Saund. 185 ; Dall. 13, pl. 22 ; Lane, 57 ; Moore, 774.

(f) 1 Roll. 608 b, B. 1.

any such gift which was made in time of sickness shall be good and firm in law, the consent and confirmation of his next heir was requisite to it. Also, if a man who had lands by descent, had issue many sons, he could not have given any of this land to any of his younger sons without the consent of the eldest, to the end that the father, who for the most part bore most (*g*) affection to the youngest son, should not disinherit the eldest. But of his land which he had acquired by his own purchase, he might have given a part to his younger sons; and if he had not any issue, he might have given all of it to whom he pleased. And all this appears in Glanville (*h*), by which it appears, that the ancient common law did (always) respect the heir at common law.

Then in the case at bar, forasmuch as by the judgment of the common law on the like words in a conveyance, it would be but an estate for life, the remainder to their children for life, thence it follows, that the intent and not the words only of the devisor ought to make it an estate tail in this case. Then this intent ought to be manifest and certain, and so expressed in the will; and in this case no such intent appears, for peradventure his meaning was to agree with the rule of the law; and therefore this difference was resolved for good law, *that if A. devises his lands to B. and to his children or issues, and he hath not any issue at the time of the devise, that the same is an estate tail*; for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum naturâ*; and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, therefore there such words shall be taken as words of limitation, *scil.* as much as children or issues of his body; for every child or issue ought to be of the body, and therewith agrees a case, Trin. 4 Eliz., reported by Sergeant Bendloes, where the case was, that one devised land (*i*) to husband and wife, "and to the men-children of their bodies begotten," and it did not appear in the case that they had any issue male at the time of the devise, and therefore it was adjudged that they had an estate tail to them and the heirs male of their bodies; but if a man

(*g*) Cro. Car. 369.

(*h*) Lib. 1, cap. 7, fols. 44, 45.

(*i*) 1 Bulst. 219; O. Ben. 30; 1 Anders.

48, pl. 110; 1 Vent. 227, 331; 3 Co. 53,

97; Litt. Rep. 347; Owen, 148; Moore,

397.

devises land to A. and to his children or (*k*) issue, *and they then have issue of their bodies*, there his express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary. And therefore in such case they shall have but a joint estate for life.

But it was resolved, that if a man, as in the case at bar, devises land to husband and wife, and after their decease to their children, or the remainder to their children; in this case, *although they have not any child at the time (l)*, yet every child which they shall have after may take by way of remainder, according to the rule of the law, for his intent appears that their children should not take immediately, but after the decease of Rowland and his wife.

Where there is a devise to a person and his children or issue, and he has no issue at the time of the devise, there such person will take an estate tail. This is well known as the rule in *Wild's Case*, in which case Coke gives the following reason, "that the intent of the devisor is manifest and certain, that his (the devisee's) children or issue should take, and as immediate devisees they cannot take, because they are not in *rerum naturâ*; and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate, therefore such words shall be taken as words of limitation."

To illustrate the rule we may refer to the case of *Seale v. Barter*, 2 Bos. & Pul. 485, there the testator by a codicil devised as follows:—"It is likewise my will, that all my lands and estates shall, after my decease, come to my son A. *and his children* lawfully to be begotten, with full power for him to settle the same, or any part or parts thereof, by will or otherwise, on them or any of them, as he shall think proper; and for default of such issue, then over. *A. had no child at the time of the making of the codicil, but he had a daughter in the testator's lifetime*, and several children after his death. It was held by the Court of Common Pleas, that A. took an estate tail, with a power to settle the estates upon his issue; Lord Alvanley observing, that *Wild's Case*, which was cited and relied on, was "the Leading case upon the subject." Ib. 492.

In *Davie v. Stevens*, Dougl. 321, where there was a devise of "the fee

(*k*) Cro. Eliz. 743.

(*l*) Moore, 220.

simple and inheritance of certain lands to the devisor's son," *and his child or children for ever*. The son was unmarried at the time of the making of the will, and of the testator's death. It was argued, that inasmuch as there were words of inheritance in the first part of the devise, it differed from *Wild's Case*. It was, however, held by the Court of King's Bench, that the son took an estate tail; Lord Mansfield observed, that to give the father an estate in fee, would be to strike the words "child or children," out of the will. "They must," added his Lordship, "operate to give him an estate tail, for there were no children born at the time, to take an immediate estate by purchase. The meaning is the same as if the expression had been, 'to his (the testator's) son, and his heirs; that is to say, his children or his issue.' The words 'for ever,' make no difference, as the son's issue might last for ever." See also *Broadhurst v. Morris*, 2 B. & Ad. 1.

Where, however, there is no child at the date of the will, but one is afterwards born, who outlives, but whose parent dies in the life of, the testator, it seems that the child will be entitled, because if the parent were held entitled to an estate tail, in such case it would have lapsed, and thus the object of the rule in *Wild's Case*, which is to preserve the estate for the children, would be defeated. Thus in *Buffar v. Bradford*, 2 Atk. 220, where part of an estate was devised to the testator's niece, "*and the children born of her body*." The niece, who died before the testator, had no child at the date of the will, but had one afterwards in the lifetime of the testator; it was contended, that the niece, according to the rule in *Wild's Case*, took an estate tail, but that as she died in the lifetime of the testator, the devise had lapsed. Lord Hardwicke, however, held, that as the child had been born during the life of the testator, and would have taken with his mother as joint tenant had she lived, as she was dead took the whole by way of remainder. "It must be allowed," said his Lordship, "that children in their natural import, are words of purchase, and not of limitation, unless it is to comply with the intention of a testator, where the words cannot take effect any other way: but suppose a devise was to A., and after his death to his children, here it is a word of purchase."

Where, however, there are *children* at the time of the devise, according to *Wild's Case*, the parent and children will take as joint tenants. "If," as is there laid down, "a man devises land to A. and to his children or issue, and he then has issue of his body, there the express intent may take effect, according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary; and, therefore, in such case they shall have but a joint estate for life." See ante, pp. 44, 545.

So, likewise, in *Oates d. Hatterley v. Jackson* (2 Stra. 1172) the testator devised an estate after the death of his wife to his daughter *Isabella and her children* on her body begotten or to be begotten by W. her husband,

and their heirs for ever. Isabella at the time of the making of the will had one daughter, and afterwards two sons and one daughter, who all died without issue. It was held, that Isabella took a joint estate in fee with her children by W., and, they having all died, that it survived to her. See also *Caffary v. Caffary*, 8 Jur. 329.

In the case, however, of *Jeffery v. Honywood* (4 Madd. 398), the testator devised an estate to his daughter M., the wife J., and to all and every the child and children, whether male or female, of her body lawfully issuing; and unto his, her and their heirs or assigns for ever as tenants in common, and not as joint tenants. The daughter died in the testator's lifetime, leaving ten children; but (though probable) it does not appear by the report whether any of them were living at the date of the will. It was held by Sir John Leach, V. C., that M. took an estate for life, with remainder to her children as tenants in common in fee. "It is plain," said his Honor, "that after-born children would be included in this devise; and it is a singular intention to impute to a father, that he means his daughter's personal interest in the estate should continually diminish upon the birth of a new child. It is admitted, that the daughter either takes the whole for life, or a share in fee. I am of opinion, that the limitation of the fee here is confined to the children; and that the mother cannot be comprehended in the expression 'his, her or their heirs and assigns.' I consider, therefore, that there are two gifts, one to the mother, without words of limitation superadded, and another to her children, their heirs and assigns. And these two gifts can only be rendered sensible by construing, as the words import, a life interest to the mother, and a remainder in fee to the children. In *Oates v. Jackson*, the mother was, by the plain force of the expression, comprehended in the limitation in fee; and I cannot consider that case either as ruling the present case or as inconsistent with the other authorities which have been cited." See also *Bowen v. Scomcroft*, 2 Y. & Coll. Ex. Cas. 640; sed vide contra, *Broadhurst v. Morris*, 2 B. & Ad. 1.

In another case the word "children" seems to have been treated as a word of limitation, so as to give the parent an estate tail, although there were children living at the date of the will (*Wood v. Baron*, 1 East, 259). And see also *Doe d. Gigg v. Bradley* (16 East, 399); but these cases are opposed to the current of authorities.

Whether the Rule in "Wild's Case" is applicable to Personality.

We may here notice a question upon which much discussion has arisen, viz. whether the rule in *Wild's Case* is applicable to bequests of personal estate. Suppose, for instance, a person bequeaths personal property "to A. and his children," and there are no children at the time of the will, does the

parent or not take an absolute interest in the personalty, which is equivalent to the estate tail, which, as we have already seen, he would, under the rule in *Wild's Case*, take under similar circumstances in the case of realty? The authorities are conflicting.

Lord Plunket, in the case of *Heron v. Stokes* (3 Ir. Eq. Rep. 168), was clearly of opinion that the rule was *applicable* to personal estate. Lord St. Leonards, when Lord Chancellor of Ireland, in the same case, was of the contrary opinion (see *S. C.* 1 C. & L. 270). Lord Brougham, however, when the same case came before the House of Lords (nom. *Stokes v. Heron*, 12 C. & F. 189), took the same view in this respect as Lord Plunket, and considered the rule as applicable to personal estate.

Now it must be remembered, the object of the rule is to give some estate to the children, and the only way in which, with regard to realty, this can be effected, is by giving an estate tail to the parent, which, if not barred, may come to the children or some of them. The same reason, however, does not exist with regard to personalty, for if a quasi estate tail be given to the parent, it would confer upon him at once an absolute interest in the personalty. This view was taken by Lord Hardwicke in *Buffar v. Bradford* (2 Atk. 220). There a testator gave real and personal estate to his niece and the children born of her body. The niece had no child at the time the will was made, but she had one (the plaintiff) born afterwards in the life of the testator. The plaintiff's mother died before the testator. Lord Hardwicke held, that the mother and children took as joint tenants. "It must be observed," said his Lordship, "that children, in their natural import, are words of *purchase*, and not of limitation, *unless* it is to comply with the intention of a testator, where the words cannot take effect in any other way. But suppose a devise was to A., and after his death to his children, here it is a word of purchase. It has been admitted very candidly by the counsel, that as to the *personal estate*, the children, though born after the making of the will, must take equally with the mother as joint tenants; for where a man gives *personal estates* to A. and her children, to construe the word 'children' to be a word of limitation, and not of purchase, would be a strained and remote construction, and would defeat the children entirely, and the first taker would have all."

The reasoning of Lord Hardwicke appears to be conclusive on the subject; in effect it is shortly this, that with regard to *realty*, the word children is converted from its ordinary signification as a word of purchase into a word of limitation, in order to carry out the intention of the testator; but that in the case of *personalty*, where by a similar mode of construction the intention would be defeated, the word "children" ought to retain its usual meaning as a word of purchase.

The case, however, of *Scott v. Scott* (15 Sim. 47) seems scarcely con-

sistent with the views laid down by Lord Hardwicke in *Buffar v. Bradford*, although the learned Judge who decided it treated the cases as distinguishable. There, after a bequest of the dividends of bank stock and of the proceeds of the sale of real estate to the testator's daughter for life, the will proceeds:—"on the death of my daughter, the bank dividends and the interest of the money arising from the sale of the T. estate to belong to *my son and his children*, unless my daughter has married and leave a child or children who may attain the age of twenty-one years. The son had no child at the father's death, but had children living at the death of the daughter. It was held by Sir L. Shadwell, V. C., that the fund belonged absolutely to the son, as at the death of the testator there was no person to take in remainder except him. And his Honor did not see that *Buffar v. Bradford* (2 Atk. 220) had any application to the case. See *vide Snowball v. Proctor*, 2 Y. & Coll. C. C. 478.

Where there is a bequest to a parent and children, simpliciter, and there are children then in existence, the parent and children will take the property together, either as joint tenants or tenants in common, according to the words of the will. See *Mason v. Clarke* (17 Beav. 126), in which case the testator gave 2,000*l.*, 3*l.* per cent. Consols, to his daughter Mary Webster and her children. The daughter at the date of the will was enceinte, and the child afterwards born died in the life of the testator. It was held by Sir John Romilly, M. R., that the child was to be considered as in esse at the date of the will, although not actually then born, and that Mary Webster took as joint tenant with her child, upon whose death she was absolutely entitled to the whole legacy. See also *Gordon v. Whieldon*, 11 Beav. 170; *Cormack v. Copous*, 17 Beav. 397; *Read v. Willis*, 1 Coll. 86; *Cunningham v. Murray*, 1 De G. & Sm. 366; *Pyne v. Franklin*, 5 Sim. 458; *De Witte v. De Witte*, 11 Sim. 41; *Lenden v. Blackmore*, 10 Sim. 626; *Paine v. Wagner*, 12 Sim. 184; *Beales v. Crisford*, 13 Sim. 592.

The Courts, however, seem anxious to give the parent a life estate where they can discover a slight indication of intention that he is only to have such estate. Thus in *Cramford v. Trotter* (4 Madd. 361) the testator bequeathed as follows:—"To Lady Scott and to her heirs (say children) I give and bequeath 1,000*l.*, 3*l.* per cent. Reduced Annuities." Lady Scott had children living. Sir J. Leach, V. C., held, that Lady Scott was entitled for life, with remainder to her children. The word "heirs," which was used as synonymous with "children," importing that they were to take after her death.

So in *Morse v. Morse*, 2 Sim. 485, the testator gave to his *daughter and her children* for their sole use and benefit 5,000*l.*, 3,000*l.* thereof to be paid

within one year after his decease, and the other 2,000*l.* within one year after the decease of his wife, and he appointed trustees for the said sums of money for his daughter and her children. Anne Morse had nine children during the testator's life (all of whom were probably born at the date of the will), and one afterwards. It was declared by Sir L. Shadwell, V. C., that the 5,000*l.* was in trust for the daughter for her life, and after her decease for all her children. The ground upon which his Honor proceeded was, that there would be an inconsistency with respect to the payment of the legacies if the mother did not take a life interest, for then different classes of children would become interested in the two portions of the legacies; and that he was bound therefore to put such a construction upon the bequests, as would make all the children participators. See also *Garden v. Pulteney*, 2 Eden, 323; Amb. 499.

Again, it has been considered, that a direction to secure property for the separate use of a married woman, will have the effect of showing that she is not to take jointly with her children. Thus in *French v. French*, 11 Sim. 257, there the testator gave 5,000*l.* to his sons in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband. And he gave the like sum to his daughter Mrs. A., *in trust as aforesaid, for the use of herself and children*. Mrs. A. had two children living at the testator's death. It was held, by Sir L. Shadwell, V. C., that Mrs. A. was entitled to the whole income of the fund for her life, for her separate use, with remainder to her children. See also *Bain v. Lescher*, Ib. 397; and Sir James Wigram, V. C., in *Ogle v. Corthorn*, 9 Jur. 325; followed *French v. French*, as an authority. See also *Dawson v. Bourne*, 16 Beav. 29; and *Mason v. Clarke*, 17 Beav. 131, where Sir J. Romilly, M. R., lays it down, that if, after a bequest to a parent and children simpliciter, "there be any superadded words, which import a desire that the property should be settled, the Court will lay hold of those words, and will infer a gift to the parent for life, with remainder to the children."

In *Vaughan v. The Marquis of Headfort*, 10 Sim. 639, the testatrix bequeathed 40,000*l.*, "to the Marquis of H. and his children, *to be secured for their use*." At the death of the testatrix, the marquis had six children. It was held by Sir L. Shadwell, V. C., that the marquis took a life interest in the fund with remainder to his children, and that construction would let in any children of the marquis that might be born thereafter. His Honor thought, that if it were not for the words, "*to be secured for their use*," the marquis and his children would have taken as joint tenants.

Upon another occasion, however, Sir L. Shadwell, V. C., seems to have taken a different view from what he had done in other cases. See *De Witte v. De Witte*, 11 Sim. 41; there the testator gave the residue of his personal estate,

in trust for the sole, exclusive and peculiar use and benefit of his daughter, *and her children*, independent of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge. It was held by Sir L. Shadwell, V. C., that the daughter and her children living at the testator's death were entitled to the residue jointly (the interest of the daughter being for her separate use); observing, that there was no reason, apparent on the face of the instrument, why the words made use of in disposing of the residuary estate should not be taken in their plain and ordinary sense. This decision was followed by Lord Langdale in *Bustard v. Saunders*, 7 Beav. 92.

Although the general propositions laid down in this note may be considered as borne out by the greatest weight of the authorities, they are, it must be confessed, from the conflicting opinions of different Judges, in by no means a certain state; and upon a closer examination of the cases it will be found, that the real terms of the rule in *Wild's Case* have in some of them been completely misrepresented, and in others confounded with the resolution in that case, from which it will be observed, the rule is perfectly distinct.

see also Audley v. Horne; 8. W.R. 150.

FORTH v. CHAPMAN.

Nov. 17, 1719.

[REPORTED 1 P. WMS. 663.]

FAILURE OF ISSUE, WHETHER INDEFINITE OR AT THE DEATH.]—

The testator bequeathed leaseholds in trust for his nephews A. and B., and he devised a freehold house and the residue of his personal estate to his nephew A., and if either of his nephews A. or B. should depart this life, and leave no issue of their respective bodies, then he gave the leaseholds to C.:—Held, that the words “leave no issue,” as to the freehold estate meant a general failure of issue, and that the first taker was entitled to an estate tail by implication; but that as to the term of years those words meant if A. or B. left no issue at their respective deaths, and that the limitation over of the leaseholds to C. was good as not being too remote.

THIS cause was reserved for the judgment of the Master of the Rolls (a), who, after time taken to consider thereof, gave his opinion. The case was,

One Walter Gore, by will devises thus: All the residue of his estate, real and personal, he gave to John Chapman in trust, only the lease of the ground he held of the school of Bangor, for the use of his nephews William Gore and Walter Gore, during the term (b) of the lease as hereinafter limited; and having given several legacies, declared his will as to the remainder of the said estate, as well as his freehold house in Shaw's Court, with all the rest of his goods and chattels, whatsoever and wheresoever, he gave to his nephew William Gore; and if either

(a) 2 Eq. Ca. Abr. 292, pl. 16; 559, pl. 15.

(b) In the *Register Book* it is said *termination*.

of his nephews, William or Walter, *should depart this life and leave no issue for their respective bodies*, then he gave the said [leasehold] premises to the daughter of his brother William Gore, and the children of his sister Sibley Price; upon which the question arose, whether the limitation over of the leasehold premises to the children of the devisor's brother and sister was void as too remote?

The Court was of opinion that the devise over was void; and said, that had the words been "if A. or B. should die without issue, the remainder over," this plainly would have been void, and exactly the case of *Love and Wyndham*, 1 Sid. 450; 1 Vent. 79; 1 Mod. 50.

Now there is no diversity betwixt a devise of a term to one for life, and, if he die without issue, remainder over, and a devise thereof to one for life, with such remainder, if he die leaving no issue; for both these devises seem equally relative to the failure of issue at any time after the testator's death; and for this the Court cited and much relied upon *Lee's Case*, 1 Leon. 285, where one devised lands to his second son William and if William should depart this life, not *leaving* issue, then the testator willed that his sons-in-law should sell his lands, and died: William had issue a son, at the time of his death, who afterwards died without issue; upon which it was clearly resolved by the whole Court, that though literally William had issue a son at his death, yet when such issue died without issue there should be a sale; for, at what time soever there was a failure of issue of William, he upon the matter died without issue. And in a formedon in reverter or remainder, whenever there is a failure of issue, then is the (c) first donee, in supposition of law, dead without issue.

His Honor mentioned the case of *Hughes and Sayer*, which he himself upon consideration had determined, and said there was a diversity betwixt issue and children, issue (d) being *nomen collectivum*; and also

(c) For which reason, although the first donee had many issues in lineal descent inheritable to the estate tail, and who held the estate, the demandant need not name any of the issues in the clause [*et quæ post mortem, &c.*], but shall say, *et quæ post mortem* of the donee, *ad ipsum reverti* or *remanere*

debet, eo quod, the donee died without issue. 8 Co. 88 a, *Buckmere's Case*.

(d) The effect of the word "issue" is particularly considered in *Lord Glenorchy v. Bosville*, Ca. t. Talb. 3; 1 L. Cas. Eq. 1; *Meure v. Meure*, 2 Atk. 265; *Goodtitle v. Otway*, 2 Wils. 6; *Roe v. Collis*, 4 Term Rep. 294.

between things merely personal and (e) chattels real; more particularly in the case of *Hughes v. Sayer*, by the devise over of the money to the survivor, if either of the donees should die without children the testator of necessity must be intended to mean a death of the donee without children living at his death; for to wait until a failure of issue, might be to wait for ever.

It being also debated by counsel, where the residue of the term vested, in regard the devise was to William and Walter Gore; the Court declared, that the subsequent words increased their interest, and gave the whole term to them, it being plainly intended to dispose of and devise away the whole term from the testator's executors; that a devise of a term to one for a day or an hour, is a devise of the whole term, if the limitation over is void, and it appears at the same time that the whole is intended to be disposed of from the executors.

Afterwards in (f) Trin. Term, 1720, this case came on upon appeal.

Lord Parker reversed the decree; and said, that if I devise a term to A., and if A. die without leaving issue, remainder over, in the vulgar and natural sense, this must be intended (g) if A. die without leaving issue at his death, and then the devise over is good; that the word "die," being the last antecedent, the words "without leaving issue," must refer to that. Besides, the testator who is *inops concilii*, will, under such circumstances, be supposed to speak in the vulgar, common and natural, not in the legal sense (h).

His Lordship likewise took notice, that in a *formedon* in remainder, where tenant in tail leaves issue, which issue afterwards dies without issue, whereupon such writ is brought, the *formedon* says (i), that the tenant in tail did die leaving issue J. S., which J. S. died afterwards without issue, and so the first donee in tail died without issue, thus the pleading says, that the donee in tail died leaving issue at his death; consequently, the words "leaving issue" refer to the time of the death

(e) So *Pleydell v. Pleydell*, 1 P. Wms. 750; but this distinction between chattels personal and real is rejected by Lord Hardwicke in *Beauclerk v. Dormer*, 2 Atk. 314.

(f) Sab. 25 July.

(g) Vide *Nicholls v. Hooper*, 1 P. Wms.

199; and *Targes v. Gaunt*, Ib. 432; and *Pisbury v. Elkin*, Ib. 564, 565.

(h) Vide *Atkinson v. Hutchinson*, 3 Ves. 258; *Goodtitle v. Pagden*, 2 T. R. 720.

(i) Quære, and see the *Register of Writs*, and 8 Co. 88 a.

of the tenant in tail, and if the words of a will can bear two senses, one whereof is more common and natural than the other, it is hard to say a Court should take the will in the most uncommon meaning; to do what? to destroy the will.

2ndly. He said that the reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate tail, is in favour of the (*k*) issue, that such may have it, and the intent take place; but that there is the plainest difference betwixt a devise of a freehold and a devise of a term for years; for in the devise of the latter to one, and if he die without issue, then to another, the words "if he die without issue" cannot be supposed to have been inserted in favour of such issue, since they cannot by any construction have it.

3rdly. His Lordship observed, what seemed very material (and yet had been omitted in the pleadings, and also by the counsel at the bar), that by this will the devise carried a (*l*) freehold as well as leasehold estate to William Gore, and if he or Walter died *leaving no issue*, then to the children of his brother and sister, in which case it was more difficult to conceive how the same words in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction (*m*) should be, if William or Walter died without issue *generally*, by which there might be *at any time* a failure of issue; and with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*. However, the Lord Chancellor said, it might be reasonable enough to take the same words, as to the different estates, in different (*n*) senses, and as if repeated by two several clauses, (*viz.*) I devise to A. my freehold land, and if A. die without leaving issue, then to B., and I devise my leasehold to A., and if A. die without leaving issue, then to B., in which case the different clauses would (as he conceived) have the different

(*k*) Vide the case of *Target v. Gaunt*, 1 P. Wms. 432.

(*l*) By the will, as it is stated above, from the Registrar's books, both in the state of the case at the Rolls and on the appeal, the limitation over was expressly restrained to the *leasehold*; but in Lord

Macclesfield's notes that word is omitted, and the devise over is general. Sed vide 3 Atk. 288.

(*m*) Vide *Southby v. Stonehouse*, 2 Ves. 615.

(*n*) Vide *Harris v. Bishop of Lincoln*, 2 Ves. jun. 240.

constructions above mentioned to make both the devises good, and it was reasonable it should be so, *ut res magis valeat quam pereat* (q).

As a general rule, in wills not coming within the operation of 1 Vict. c. 26, s. 29, where a testator has used expressions denoting a failure of issue, such as "in default of issue," "for want of issue" (*Boehm v. Clarke*, 9 Ves. 580), if "he die without" (*Doe d. Jones v. Owens*, 1 B. & Ad. 318; *Barlow v. Salter*, 17 Ves. 479), or "without having" (*Cole v. Goble*, 13 C. B. 445), or "before he has any" (*Newton v. Barnardine*, Moore, 127) "issue" (see also *Everest v. Gell*, 1 Ves. jun. 286), in all these and similar cases (with the exceptions hereinafter mentioned), if there be nothing in the context to vary the construction usually put upon those expressions, they will be held to refer to a general failure of issue, and not a failure at any particular time, as at the death.

The distinction, however, laid down in the principal case, between the effect of a devise of realty and a bequest of personalty, in the event of a person dying without *leaving* issue, although questioned by Lord Kenyon in *Porter v. Bradley* (3 T. R. 146), has ever since been firmly adhered to. "When," observes Lord Eldon, "I read the case of *Porter v. Bradley*, speaking with all due deference to the learned Judge who expressed that dictum, it appeared to me, that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord Kenyon himself, as not to be shaken. I never knew it shaken." See *Crooke v. De Vandes*, 9 Ves 203; and *Elton v. Eason*, 19 Ves. 79; *Cole v. Goble*, 13 C. B. 443, 454; *Bamford v. Lord*, 14 C. B. 708.

We may therefore consider it as fully established by the principal case, that although, where there is a devise by will, on the death of a person "without *leaving* issue," the general rule as to realty will be applicable, and those words will relate to a general failure of issue; nevertheless there is an exception to the rule when those words relate to personalty, even in the same will, as they will import a failure of issue at the death.

And the words "in default of issue" may be construed by subsequent expressions to mean "in default of leaving issue," so as to confine the

(o) And this case has been considered as an authority for a different construction of the same words as applied to different sub-

jects, in *Sheffield v. Lord Orrery*, 3 Atk. 288; *Earl of Stafford v. Buckley*, 2 Ves. 180.

meaning with regard to personalty to issue living at the death. Thus in *Darley v. Martin*, 13 C. B. 683, a testator by his will, made in the year 1820, gave and bequeathed to his daughter Mary, her executors, administrators and assigns, certain leaseholds for life; and from and after her decease, he gave and bequeathed the same "unto and amongst the *lawful issue* of his said daughter Mary, equally share and share alike, with benefit of survivorship; and in *default of such issue*, he gave and bequeathed the same unto his son George for his natural life; and after his decease to his children equally, share and share alike, with benefit of survivorship." He afterwards made a codicil, which contained a recital that he had by his will given and bequeathed the leaseholds to his son George "after the decease of his daughter Mary, and in default of her *leaving lawful issue*;" and then went on to provide, that in the event of his son not indemnifying his estate from a liability he the testator had incurred on his account, all the bequests to his son (but so far as concerned the son only) should be revoked. It was held by the Court of Common Pleas, that the testator, by the expressions he had made use of, meant issue living at the death of the daughter. "It appears to us," said Jervis, C. J., "that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil, but rather, that the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil; and that accordingly, the gift over in the will, 'in default of such issue,' being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense; because in the codicil he refers to it as if it were a gift over in default of his daughter's '*leaving*' no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument, thus viewed, appears to us to be well founded; and we are therefore of opinion, that, even if the preceding limitation conferred an absolute interest on the daughter, such gift was subject to a good executory bequest over in favour of the plaintiffs, who are consequently entitled to our judgment."

Another exception from the general rule is where the property is given over in default of *issue* of the testator himself, which will be construed to mean issue living at his death (*French v. Caddell*, 3 Bro. P. C., Toml. Ed., 257; *Wellington v. Wellington*, 4 Burr. 2165; 1 W. Black. 645; *Lytton v. Lytton*, 4 Bro. C. C. 441; *Sanford v. Irby*, 3 B. & Ald. 654; *Doe v. Lucraft*, 1 M. & Sc. 573; 8 Bing. 386; and see *Egerton v. Jones*, 3 Sim. 417); à fortiori, where, amongst the ulterior limitations, provisions are found which could not reasonably be meant to depend upon a general failure of issue. *Rye's Settlement*, 10 Hare, 106.

The effect, with regard to realty, of holding that words importing a failure

of issue mean a general failure, will ordinarily be to give an estate tail by implication to the first taker, upon which a valid remainder can be limited (see ante, p. 361); but as no such estate can be given by implication in personalty, any gift over after a general failure of issue will be void, as too remote; hence the reason for the distinction taken in the principal case, by adopting which the bequest over is good; and, as observed there by Lord Macclesfield, "it is reasonable that it should be so, ut res magis valeat quam pereat."

" These reasons have also induced the Courts, more readily in the case of personalty than realty, to allow the context to restrain words importing a general failure of issue so as to mean failure of issue living at the death; in which case, in the same mode as where express words are made use of restricting the period of failure to that event, the gift over will be valid (*Doe d. Barnfield v. Wetton*, 2 Bos. & Pul. 324); and it may be here mentioned, that where a devise over was on the death of a person "leaving no issue behind him," it was construed as meaning, "issue at the time of the death." *Porter v. Bradley*, 3 T. R. 145; and see *Verulam v. Bathurst*, 13 Sim. 374, 388.

In consequence of the distinction taken between real and personal estate, it will be more convenient to consider the cases respecting each species of property separately.

As to Real Estate.

Where, after a devise to a person and his heirs, there is a limitation over on his death either under (*Price v. Hunt*, Pollexf. 645; *Eastman v. Baker*, 1 Taunt. 174) or above (*Glover v. Monckton*, 3 Bing. 13) a particular age without issue; in the first case it will be considered as a devise in fee with an executory limitation over, contingent on the event of the first taker dying under the age mentioned, and without issue at his death; in the second case, a devise in fee with an executory limitation over, contingent on the event of the first taker dying above the age mentioned without issue living at his death. See also *Hall v. Deering*, Hard. 148; and see and consider *Doe d. Johnson v. Johnson*, 8 Exch. 81; *O'Donohoe v. King*, 8 Ir. Eq. Rep. 185.

A devise over in the event of issue dying under twenty-one, will not have the effect of restraining the meaning of words importing a general failure of issue, to a failure of issue at the time of the death. *Grimshawe v. Pickup*, 9 Sim. 596.

Again, where there is an executory gift over of a life interest or life interests *only*, on a failure of issue, the usual signification of those words

will be controlled so as to mean a failure of issue living at the death of the first devisee (*Roe d. Sheers v. Jeffery*, 7 T. R. 589; *Trafford v. Boehm*, 3 Atk. 449); but this construction will not prevail if any of the ulterior limitations are not for life only. *Doe d. Jones v. Owen*, 1 B. & Ad. 318; *Destouches v. Walker*, 2 Eden, 261; *Barlow v. Salter*, 17 Ves. 482; sed vide *Doe d. Lyde v. Lyde*, 1 T. R. 593; *Simmons v. Simmons*, 8 Sim. 22; *Lepine v. Ferard*, 2 Russ. & My. 378, 389; *Rye's Settlement*, 10 Hare, 111.

Where a sum of money or legacy is to be paid to some person mentioned in the will by the person entitled under the executory gift, upon its taking effect in possession, or within a limited time after, the failure of issue, upon which the executory gift depends, will be restrained to the death. See *Nichols v. Hooper*, 1 P. Wms. 198; 2 Vern. 686. So also in *Doe d. Smith v. Webber*, 1 B. & Ald. 713, where a testatrix devised all her real estate, and all the residue of her personal estate, to her niece M. Hiles, her heirs, executors, administrators or assigns for ever; and in case her niece M. Hiles should happen to die and leave no child or children, then to her niece J. B., and her heirs for ever, she paying 1,000*l.* unto the executor or executors of Mary Hiles, or to such person as she by her last will should direct. Lord Ellenborough held, that the words "child or children," meant the same as issue, but that the payment directed to be made of the 1,000*l.* showed, that a failure of issue at Mary Hiles's death was intended; and that she was consequently entitled to a fee simple determinable on a failure of issue at her death, and not to an estate tail. "The payment of 1,000*l.* in this case," said his Lordship, "is a personal provision, and being to be made to a person or persons appointed by M. Hiles in her will, the event contemplated by the testatrix seems to have been an approximate, and not a remote event, namely a failure of children or issue at M. Hiles's death, and not an indefinite failure of issue, which might happen at any remote period." See also *Doe d. King v. Frost*, 3 B. & Ald. 546; sed vide *Dunk v. Fenner*, 2 Russ. & My. 557; *Doe d. Cape v. Walker*, 2 Scott, N. S. 317; *Doe d. Todd v. Duesbury*, 8 M. & W. 514.

Very refined distinctions have been taken by the Courts on this subject. Thus where the devise over has been on a person's dying without leaving issue on (*Doe d. King v. Frost*, 3 B. & Ald. 546; *Parker v. Birks*, 1 Kay & J. 156) or at (*Ex parte Davies*, 2 Sim. N. S. 114) his death, a restrictive meaning has been given to those words (see also 1 Mer. 22). Where, however, the expressions made use of were, "on" or "after," the decease, it has been held that a general failure of issue was intended. See *Walter v. Drew*, Com. Rep. 372; *Doe d. Cock v. Cooper*, 1 East, 229. See and consider *Wyld v. Lewis*; 1 Atk. 432; West, Ca. t. Hard. 311.

As to Personal Estate.

Where, after words in their ordinary legal sense importing a general failure of issue, there is a gift over on death under a particular age, and without having issue (*Martin v. Long*, 2 Vern. 151; *Pawlet v. Dogget*, Ib. 86; *Bradshaw v. Skilbeck*, 2 Bing. N. S. 182), or where the gift over is prefaced by such words as "immediately after the decease" (*Stratton v. Payne*, 3 Bro. P. C., Toml. Ed., 99; *S. C.* cited in *Read v. Snell*, 2 Atk. 647), or "after the decease" (*Pinbury v. Elkin*, 1 P. Wms. 563; 2 Vern. 753; Prec. Ch. 483; *Wilkinson v. South*, 7 T. R. 558; *Trotter v. Oswald*, 1 Cox, 317), or "at the death" of the first taker (*Rackstraw v. Vile*, 1 S. & S. 604; *Doe d. King v. Frost*, 3 B. & Ald. 546), such words have been held to be restrictive to failure of issue at the time of the death. In the case, however, of *Donn v. Penny*, 19 Ves. 545; *S. C.* 1 Mer. 20,—Sir W. Grant, M. R., doubting the soundness of the decision of *Pinbury v. Elkin*, held, that a devise over "for want of issue male after him," did not mean immediately after the decease of the first taker, and, consequently, did not restrict the words importing a general failure of issue to a failure at his decease.

So, likewise, the word "then" will not have a restrictive sense; to use the words of Lord Brougham, "it will be considered as a particle of inference, connecting the consequence with the premises, and meaning, "in that event," "if that happens." 2 Russ. & My. 411; see also *Stanley v. Lennard*, 1 Eden, 87; *Beauchlerk v. Dormer*, 2 Atk. 308; *Pye v. Linwood*, 6 Jur. 619.

In the event of the gift after the general failure of issue to the survivor of several persons being *personal* to himself and not transmissible to his personal representatives, in case of his death before the happening of the contingency, it seems that a restrictive sense would be put upon words importing a general failure of issue (*Ranelagh v. Ranelagh*, 2 My. & K. 441; *Westwood v. Southey*, 2 Sim. N. S. 192; *Turner v. Frampton*, 2 Coll. 331; and see *Hughes v. Sayer*, 1 P. Wms. 534); unless the gift to survivors be followed by words of limitation (*Massey v. Hudson*, 2 Mer. 134; *O'Donohoe v. King*, 8 Ir. Eq. Rep. 185), or the gift over is to take effect on the failure of issue of persons who shall be living at the time (*Campbell v. Harding*, 2 Russ. & My. 390), or is made to a person living at the death of the person whose issue is mentioned by the testator. *Garratt v. Cockerell*, 1 Y. & Coll. C. C. 494.

Where a power of appointing amongst issue precedes a limitation over upon the death of the appointor without issue, it will be presumed that such issue is intended as might be living at the death of the appointor, and a

restricted meaning given to the limitation over (see *Target v. Gaunt*, 1 P. Wms. 432, Gilb. Eq. Ca. 149; *Hockley v. Mawbey*, 1 Ves. jun. 143; *Martin v. Swannell*, 2 Beav. 249; *Crozier v. Crozier*, 2 C. & L. 294; see vide *Simmons v. Simmons*, 8 Sim. 22); secus where there is an express limitation to the issue in default of appointment. *Seale v. Barter*, 2 Bos. & Pul. 485; *Smith v. Death*, 5 Madd. 371; *Davulson v. Proctor*, 19 L. J., Ch., 396; 14 Jur. 32.

With regard to wills coming under the operation of the 29th section of the New Wills Act (see *ante*, p. 525), it must be remembered that words importing either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, will be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue (see *Re O'Bierne*, 1 J. & L. 352), unless a contrary intention appears by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise; and there is also a proviso that the act is not to extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description, required for obtaining a vested estate by a preceding gift to such issue.

This section, it seems, does not apply to cases which previously could not have been held to refer to an indefinite failure of issue (*Morris v. Morris*, 17 Beav. 198), nor, it seems, to cases where a dying without "an heir," or "heirs of the body," is mentioned. *Harris v. Davis*, 1 Coll. 416.

As to the exception in the 29th section, where the referential construction is adopted, see *Green v. Green*, 3 De G. & Sm. 480.

TALTARUM'S CASE (a).

De Termino Michaelis, 1472.

[REPORTED YEAR BOOKS, ANNO 1472, 12 EDWARDI 4, 19.]

RECOVERY—ENTAILS.]—*T. B., being seised of lands in fee, made a gift of them to W. S., and the heirs of his body, who thereupon was seised thereof; W. S. died, leaving H. S., his eldest son, on whom the lands descended, who entered and was seised per formam doni. H. S. enfeoffed T. of the lands in fee, who made a gift of them to H. S. and J. his wife, and to the heirs of their bodies, remainder in fee to H. S., by force of which they were seised. J. the wife afterwards died, whereupon H. S. became solely seised in tail. T. A. then brought a writ of right against H. S. and counted his possession against him. H. S. made defence and vouched to warranty one R. K., who entered into the warranty and joined the wise on the mere right. Afterwards R. K. the vouchee made default, and departed in contempt of Court; in consequence of which final judgment was given, that the demandant T. A. should recover the lands against H. S., and that H. S. should recover lands of equal value of R. K.*

(a) It is much to be regretted that neither Parliament nor our Inns of Court have brought out a new edition of the Year Books. In any other country but this, a series of Reports spreading over nearly three centuries, from the beginning of the reign of Edward 1, to nearly the end of the reign of Henry 8, and of so great interest as illustrating the history of the law and of the country generally, would not have remained accessible only to a few, in black letter and Norman French. The late eminent jurist, Mr. Justice Story, in a letter to the Benchers

of Lincoln's Inn, made the following remarks upon this subject:—"I cannot but hope that Parliament may be induced to order a translation and publication of all the Year Books (the unpublished as well as the published), as well as all the records of the early cases decided in Chancery: they would contain invaluable materials for an exact history of the Common Law and of Equity, which, I fear, in a few years, will be wholly inaccessible to the bulk of our profession." 3 Law Rev. 383.

the vouchee. H. S. afterwards died without heirs of his body, but leaving R. S. his brother and heir under the entail surviving him:—Held, that R. S. was not barred by the recovery, because H. S. was not seised of the estate tail at the time of the recovery, but of another estate, and as the recovery in value went according to the estate whereof the tenant in tail was seised at the time of the recovery, and not in recompense of the estate he had not, the issue in tail could have no recompense in this case, and therefore was not barred by the recovery.

Semble, that if H. S. had been actually seised of the estate tail at the time of the recovery, the recompense in value would then have descended in lieu of the estate tail, and the issue in tail would therefore have been barred.

IN a writ of entry upon the statute of Richard (b), *ubi ingressus non datur per legem*, &c., sued against one John Smith, the defendant said that the plaintiff ought not to have the action, because before the supposed entry one T. B. was seised of the tenements, &c., in fee, and made a gift of them to one W. Smith, to have and to hold to him and his heirs of his body begotten, by force of which he was seised, &c., and had issue one Richard, and died, by (c) protestation, seised, &c., and the tenements descended to Richard, and he entered and was seised, &c., and had issue the said John Smith, and died seised, and the tenements descended to the said John Smith, and the plaintiff claiming by colour of a deed of feoffment before the gift, &c. entered, upon whose possession the said John Smith, as son and heir of the said Richard at the time of the supposed entry, entered, &c.; upon which entry the plaintiff hath conceived this action, to which the plaintiff said that good and true it is, that the said Thomas Smith gave the tenements *ut supra*, &c.; but he said that the said William Smith had issue, one Humfery the elder, and the said Richard the younger, and died, after whose death Humfery entered, and was seised *per formam doni*, &c., and so being seised, one T. Tal-

(b) 5 Rich. 2, c. 8, enforced and amended by 15 Rich. 2, c. 2. abolished, see Litt. 192, 193, Toml. Ed.; Steph. Plead. 249, note (g).

(c) As to pleading protestando, now

tarum sued a writ of right against the said Humfery, returnable, &c., at which day the parties appeared, and the said Taltarum counted of his possession, and the said Humfery made defence and vouched to warranty one Richard King, who was present and entered into the warranty, and joined the mise on the mere right (*d*); and the said Taltarum pleaded and afterwards returned, and the tenant by the warranty did not return, but made default in contempt of court, by which the demandant had final judgment against the said Humfery, and he over against the tenant by the warranty, by force of which the said Taltarum entered and was seised, &c.; and afterwards the said Humfery died without heir of his body, &c.; and after that Taltarum enfeoffed this plaintiff, by which he was seised, when the defendant entered, &c.: to which the defendant said, that good and true it is that the said William had issue Humfery his elder and Richard his younger son, and died, that after his death the tenements descended to Humfery, as son and heir, and he entered and was seised as son and heir *per formam doni*, &c.; but he said that the before-mentioned Humfery, before the writ purchased, &c., enfeoffed one Tregos, in fee, of the said tenements, &c., which Tregos, before the writ purchased, made a gift of the tenements to the said Humfery, and to one Jane his wife, to have and to hold to them, and to the heirs of their bodies begotten, the remainder to the right heirs of the said Humfery, in fee, &c., by force of which they were seised, &c., and then Jane died, after whose death Humfery was solely seised of the said tenements, as tenant in tail after possibility, &c.; and so being seised the said Taltarum sued the said writ of right and recovered against the said Humfery, in the manner and form as he had alleged, which Humfery, continuously after the said judgment, during his life, was seised of the said tenements by force of the gift made to him and to his wife, and died without heir of his body, after whose death the said Richard, as brother and heir of the said Humfery of the body of [the said] William begotten, entered and was seised by force of the gift made to William, and died seised, and it descended to the said John Smith (*e*), and he entered, and was seised by force of the gift, &c.; without this, that the said Taltarum,

(*d*) This plea was considered as the the count.
general issue, yet contained no denial of

(*e*) 20 H. 6, 41; 12 H. 7, 10.

after the said recovery, in the life of the said Humfery, entered into the said tenements as he had alleged, and without this, that the said Humfery had any other estate in the said tenements [jour] from the day of the writ of right purchased, or afterwards, save by force of the gift made to him and his wife, &c.; and without this, that the said Taltarum was seised of the said tenements as of fee, and of right in the time of the king, as he had alleged, and thus the said recovery by the writ of right was false and feigned [feint] in law.

Catesby (g).—Sir, it has been considered before these times that the plea is not good, because the defendant entered, notwithstanding the judgment delivered against his father, where he should be put to a formedon, &c. Sir, it seems that the entry was lawful, because the first right of the entail remained notwithstanding that recovery, then when the land descended to the heir, and was cast upon him, then he was in his remitter; but if it were of the fee simple recovered against the ancestor, notwithstanding that no execution was sued, yet the entry of the recoveror shall be lawful upon the heir; and if the tenant in tail discontinue, and repurchase the land, and then grant a rentcharge, and die seised, the issue shall hold discharged, and still the fee descends upon him; but by reason of the right that descends upon him, he shall be in his remitter, &c. (*h*). As to the other question, notwithstanding the ancestor had judgment to recover in value, yet that will not bind the issue, because he will not be able to recover in value of the first entail, because this entail was discontinued, and a new estate taken *ut supra*; for by reason of the first entail, the donor ought not to warrant, forasmuch as the tenant was in of the other estate, so that this recovery in value upon this estate that the tenant had, at the time of the recovery, cannot avoid the first entail, per quod, &c.

Fairfax (i), contra.—Sir, it seems that the entry was not lawful, for when the judgment was given, it would bind the tenant and his

(*g*) Catesby was afterwards made one of the judges of the Common Pleas, in 1481. see Foss's Judges of England, vol. 4, p. 423.

(*h*) 19 H. 6, 61.

(*i*) Fairfax was afterwards made a Justice of the King's Bench, 1477, Foss's Judges of England, vol. 4, p. 430.

heirs, so that upon them as tenants, the judgment shall be executed, for when judgment is given, you ought to see that it is carried into execution; and if the heir has any remedy, that will be in formedon, by the right of the entail, and not in this action, for if a fine *sur conusance de droit come ceo qu'il ad de son done* be levied by the tenant in tail, the heir ought not to have a continuance against that fine, like as when the ancestor continues seisin; but at all times the entry of the conusee will be lawful against him, and he will be put to his formedon, &c.; but in the case of grant of rent, &c., it is otherwise, for there it is only a matter [en fait] in *deed* by the tenant in tail; but otherwise is of matter of *record*, &c.; and as to the other point, sir, inasmuch as the tenant was not in by the first entail, yet when he shall have judgment in value, of which judgment the issue can have execution, it seems that he shall not falsify the recovery.

Nele, J. (j)—It seems that the entry is not lawful, because when the judgment is given against the tenant in tail, this will bind the issue as to the possession, so that the entry of the recoveror will be lawful against him, but if the recoveror wishes to sue out a *scire facias* upon the judgment, &c., against the issue, then the issue can falsify the recovery, because he who shall have judgment hath enabled his issue to his recompense; but if he does not wish to sue out a *scire facias*, but enters, &c., the entry of the issue shall not be binding upon him, &c. (*k*), and as it hath been said, the issue cannot aver a continuance of possession against the fine *sur conusance de droit come ceo qu'il ad de son done*; and, sir, if judgment be given against the tenant for life, and before execution my tenant for term of life dies, the entry of the recoveror is lawful against me, and then I cannot enter against him, but shall be put to my writ of entry *ad communem legem*, and it shall falsify the recovery; and if there be erroneous recovery against the tenant in tail, &c., the issue does not avoid the recovery for that error, &c., but shall be put to his writ of error, &c. So here, by this judgment, the entry upon the issue shall be lawful, and he is put to his formedon, &c. And, sir, as to the other question, inasmuch as he has judgment of recovery in value,

(j) Justice of the Common Pleas, see (k) Litt. 157.
Foss, vol. 4, p. 395.

yet that does not avoid the first entail, because the land recovered in value cannot be in place of the first land, for that, at the time of the recovery in value, the tenant was not in by reason of the first entail but also by the second entail, or in fee simple, and the entail shall not be avoided, unless the recovery in value was against the donor or his heir, &c., by which, &c.

Littleton, J. (l)—As to the entry, it appears that it is lawful, because notwithstanding this recovery the right of the entail was not defeated, but descended to the issue, and also the possession descended upon him, by which he is in his remitter, &c. And, sir, if a recovery be suffered against the tenant in tail, and before execution he die, and the land descends to his issue (m), now without any entry the possession is in him, and by reason of that possession he will be tenant to the man who has cause of action; and for the same reason when he has cause of action by reason of the right of the entail, and against himself he cannot have action, by which he shall be said to be in his remitter; and, sir, if recovery be [had] against husband and wife by default, and the husband die without execution, the wife shall be adjudged in her remitter, for it will only be a circuitry of action, although the recoveror enter upon him (n), and then the feme will have *cui in vita*, and recover against him. So here, when the land descends to the heir, there will be a circuitry to give the entry to the recoveror, and then to send the heir to his formedon, &c. And, sir, if tenant in tail discontinue, and then the discontinuee lease the same to the tenant in tail for term of life, with remainder over to his eldest son, and then the tenant in tail dies, the issue who is in the remainder shall be adjudged in his remitter, for he was not party to the acceptance of the estate; and, sir, a recovery which is executed against the tenant in tail under false title is but a discontinuance, as is alienation, for the one and the other shall put the issue to his formedon, &c. And, sir, as to recovery in value, that cannot avoid the first entail, because at the time of the recovery the tenant was not in by the same entail, &c. Then that

(l) One of the Justices of the Common
Pleas, Foss, vol. 4, p. 395.

(m) Litt. 157.

(n) Litt. 155.

not recovered in value cannot be in place of the first entail, but that which the tenant in tail recovers in value against the donor or his heir, or a stranger by reason of a release with warranty, it is all one, because the land recovered in value against the donor ought to be estate tail to the tenant and the heirs of his body, according to the nature of the first entail, as well in the one case as in the other; but if he who recovers in value were not in by the first entail, but be seised in fee simple or by another entail, then the land recovered in value is not in place of the first estate tail, per quod then the heir can falsify such recovery, &c.

Choke, J. (o)—As to the remitter, as to what is said that a recovery and alienation is the same thing, and so that [where] the ancestor dies seised the heir shall be in his remitter in one and the other [case], &c. Sir, it is not all one, because if a recovery against tenant in tail be by action tried, this recovery shall bind the heir, that he shall not falsify it on the same point, but shall be put to his attain (*p*); if recovery be had against the tenant in tail by default, and before execution the tenant in tail die, and it descends to his heir, &c., nevertheless the entry of him who recovers shall be lawful upon him, because the possession is so bound, that it is executory against the issue, and nothing remains to the issue but the right by formedon, &c., because the recovery defeats the possession of the tenant in tail, but feoffment by the tenant in tail affirms the possession in the tenant in tail; and, sir, as it has been said, the issue ought not to aver continuance, &c., nor dying seised, &c., against a fine sur conusance de droit, &c., de son done, &c.; for where such fine is levied, or recovery suffered against the tenant in tail, it is in law, as if there were no dying seised, &c.; and as to the recovery in value, it accords with reason of Littleton (*q*).

(*o*) One of the Justices of the Common Pleas, *Foss*, vol. 4, p. 395.

(*p*) Although it is a great principle of law that the decision of a jury upon an issue of fact is in general irreversible and conclusive, there was, in ancient law, one means of appeal from a verdict of a jury in

certain cases, viz. by writ of *attain*; upon which there was a kind of new trial by twenty-four new jurors; but this proceeding was abolished by 6 Geo. 4, c. 50, s. 60; *Steph. Plead.* 105.

(*q*) See sects. 594, 633, 636.

Brian, C. J. (r).—As to what Littleton says, that if recovery is against the husband and his wife, &c., and the husband dies before execution, &c., that the wife shall not falsify the recovery in assise, &c., if he who recovers enter, &c. Sir, I say that there is not diversity, where one is a party to a recovery and where not, because he delays execution for ever against him who is a party, because if a recovery be had against the tenant in tail and his eldest son jointly, although that the father die seised, the judgment is executory against the issue, &c., forasmuch as he is a party to the judgment, &c.; but in that case at the bar the heir was not party, by which, when the land was cast upon him, he was in his remitter, and the entry of the recoveror was not lawful against the issue; and, as hath been well said, there is a diversity where land in fee simple is recovered and where land entailed *ut supra*. And, sir, as to the other point, we come to the conclusion that an entail shall not be void by a recovery in value, unless that which is recovered in value, comes in lieu of the other, and that cannot be unless the recovery in value be against the donor or his heir, &c.; for it is a common learning that if John at Stile grants land to me in tail, and then I recover in value against the donor, that of this land recovered in value the issue shall have formedon, and if the other says that he did not make a gift of it, the demandant ought to shew special matter, &c., so this land recovered in value shall be in place of the first, &c. But if John at Stile gives land to me in tail, and then I recover against Robert at Noke by a release with warranty, &c., this land thus recovered in value shall not be called a gift by John at Stile, but by Robert Noke; thus the land is not in place of the first, &c., by which the recovery in value by the tenant in tail shall not prejudice the issue, unless that the tenant was in by force of the entail, and that he recover against the donor or his heir; but in that case at the bar he was in at the time of the recovery in fee simple, &c., by which, &c.

Pigot [addressing *Littleton*].—Sir, your ground, that is to say, where one has right, and the land is descended and is cast upon him, that he shall be in his remitter in order to avoid the circuitry, &c. That shall not be taken so largely, because where land is recovered against tenant

(r) One of the Justices of the Common Pleas, *Foss*, vol. 4, p. 395.

in tail by action tried, and the tenant dies before execution, and the land descends to the heir, still the entry of the recoveror shall be good upon him, and the heir put to his attain, and yet the right in tail descends to him, and he shall have the land, &c., and so it is of recovery against the husband and his wife *ut supra*. And the law is the same where land of fee simple is recovered against me by false title, and I die before execution, the land descends to my heir—the right also; and yet the entry of the recoveror is lawful and good against the issue, and he is put to his writ of right.

The Justices then rose, &c.; but it seems to me as to the case of attain *ut supra*, that that is not proved, &c., because the heir ~~can~~ have attain, as if he himself were seised of the land, but he cannot have formedon when he himself is tenant, &c.; and as to the case of land of fee simple recovered, &c., *ut supra*, sir, the issue has no title, except by his ancestor who was bound by the judgment, by which the issue cannot be in a better condition; but the issue in tail does not claim through him against whom the judgment is given, but claims by the gift, and so it does not appear, &c.

Fairfax, ad alium diem, argued that the entry as to the issue shall not be lawful, and that he could not falsify the recovery in this possessory and personal action, because the father was bound by the judgment, and this judgment executory against the party and his heir; and if the heir shall have any remedy of falsifying, &c., it shall be in formedon. And, sir, as to the other point, because he shall have recovery in value whereof the heir could well have execution, he shall not be received to falsify it; and he used the same argument as he used the first day, &c. On the other point, he shall not falsify this recovery, for when the mise is joined in a writ of right, although the party made default afterwards, the judgment shall be final and upon the mere right; but it is otherwise if the demandant recover in a writ of right by default before the mise joined, &c. For the recovery is not but as in another action, then here the mise was joined on the mere right, and afterwards the tenant by the warranty did not maintain it, but departed in despite of the Court; therefore this is also as strong for the demandant as if the mise had been found for him by the grand

assise, in which case the issue shall not falsify it in the same point, &c. ; no more than he shall here, &c.

Catesby.—To the contrary, and as to the point that the mise was joined, and then the tenant by the warranty departed, that this shall be as strong as if it had been tried by the grand assise, &c. Sir, here it appears that the mise was not joined by the tenant, nor was the cause that the demandant should have judgment to recover, by the act of the tenant in tail, but by the vouchee, who was made party upon the covenant, to wit, the warranty between him and the tenant in tail, by which there is no reason that the act of the vouchee should be prejudicial to the issue in tail, &c. And as to the other points he argued as he did the first day, and said moreover that notwithstanding the issue in tail could not aver continuance against fine sur comusance de droit come ceo, &c. Sir, this is by the statute, for it is contrary to the words of the fine, &c. ; but yet he might shew the entail, and that since the fine his ancestor died seised, and it descended to him, so that he was in in his remitter, &c.

Littleton, J.—There is a great diversity between a thing that was at common law and a thing given by statute ; if rent be recovered by the defendant against the tenant of land of fee simple, neither he nor his issue will have remedy to falsify that ; but it is otherwise if it be made against the tenant of the land entailed, for the issue can falsify it, for it is aided by the statute, and the other is at common law. And thus it is, if I am disseised, the heir of the disseisor being in by descent, and afterwards he dies without heir, and the lord recover by writ of escheat, yet I shall have my writ of entry upon disseisin in the *post*, and recover ; but if the lord recover against the issue by writ of *cessavit* I shall have no remedy, because this cesser is given to the lord by the statute, and the other action by the common law, &c. And if tenant for term of life, where there is a remainder over, loses by default at common law, the remainderman shall have no remedy, because he cannot have a writ of right, for this that he was never seised ; but still remedy is given by the statute to him ; but again, if such tenant lose by default, and before execution dies, the remainderman shall falsify that

recovery in assise or *scire facias*; for the possession was cast upon him after the death of the tenant for life, &c. And sir, in that case, when the land descended to the issue, he was in his remitter, as I said the other day, and no one will deny if the recoveror had entered in the life of the recoveree, &c. and he had re-entered and died seised, that the heir shall be in his remitter, because the judgment was executed; and again, where a fee simple descends to the issue, then à fortiori, when the recoveree died, and the same estate tail descended to the issue, he shall be in his remitter, &c. And, sir, with regard to the point, that if the tenant in tail recover in value against others than against the donor or his heir, that this shall not be an entail in lieu of the other, I think that it is all one, if he recover against a stranger in value as against his donor, and that of this land so recovered in value his heir shall have formedon, and show the gift to be made by him against whom he shall recover in value; and if the gift be traversed he ought to show how on such a gift the first land in tail, and afterwards such a one, that is to say, he whom he supposes donor, released with warranty to him, and he was impleaded and vouched, and recovered in value, and that land taken in value, &c. Because such estate as the tenant had he warranted, and that was an estate tail, and such estate he recovered in value, &c. But, sir, in the case at the bar, he who recovers in value was not in by the first entail, because that was discontinued; so this land recovered in value could not be entailed on the issue, &c., for it may be that another heir is entitled to have execution of this judgment in value, and not this heir in tail, &c., wherefore it seems to me that the falsification is good.

Choke, J.—As to the point that the recovery had against the tenant in tail, and before execution he dies, so that the land descends to his issue, that he shall be in his remitter, if the recovery be also, and that the entry of the recoveror shall not be lawful upon him, &c., sir, I think that is not so; when the judgment is given against the ancestor the possession that he had afterwards is as null, so that the issue shall not be admitted to say that he died seised against the judgment, &c. And the same law is the same on fine, *sur consuance de droit, &c. de son done, &c.* And, sir, although the issue in tail may be in his remitter,

and in by force of the entail against every other, except against the discontinuee, that is to say, against the recoveror, yet against him he is not in his remitter, by cause of the judgment, as if tenant in tail discontinue, and his son disseises the discontinuee to the use of the tenant in tail, and then he dies, and the land descends to his issue, he is in his remitter against every one else, except against the discontinuee, but against him he is not in his remitter, because he was a party to the *tort*, &c., so that one can be remitted against any person, and against no other, and so here; and as to the point of recovery in value, it accords with the opinion of Littleton, &c., *ut supra*, 15; 13 E. 4, Ca. 1 Litt. 689, fol. 155.

EDWARD SEYMOR'S CASE (a).

Mich. 10 Jac. 1, in B. R.

[REPORTED 10 Co. 95 b.]

ESTATES OF INHERITANCE.]—*Every estate descendible to the heir is either an estate of inheritance or an estate of freehold. An estate of inheritance is either fee simple or fee tail. An estate of fee simple is either an estate of inheritance absolute and indeterminate, as where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee simple determinable, and that is in two manners, sc. either expressly derived out of an absolute and pure estate in fee simple, or implicit, and derived out of an estate tail; out of an absolute estate in fee also in two manners; first, by condition, as upon mortgage, and that is called a fee simple conditional; secondly, by limitation, as if A. enfeoffs B. of the manor of D., to have and to hold to him and his heirs, so long as C. has heirs of his body, and that is called a fee simple limited and qualified. And in both these cases the whole estate in the land is in the feoffee; and, therefore, no remainder or reversion can be expectant upon either of them; implicit, and derived out of an estate tail, as where tenant in tail by bargain and sale enrolled conveys to a man and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple, as long as the tenant in tail has heirs of his body, derived out of the estate tail; and this is a more inferior and subordinate estate in fee simple than the other two aforesaid, for upon this a remainder or reversion may be expectant.*

(a) *Heywood v. Smith*, entered 7 Jac. B. R. 131; Cro. Car. 58; Hard. 414; Carthew, 101; Rep. Q. A. 20, 103.

A person may plead that he is seised of the land in his demesne as of fee, without showing the beginning of his estate, as well when he has a fee simple derived out of an estate tail, as a fee simple conditional or limited.

An estate of freehold descendible, in like manner is either expressed or implied; expressed, as if a man demises land to one and his heirs during the life of J. S., or tenant for life grants his estate to one and his heirs; in these cases the lessee or grantee has an estate of freehold descendible, but no estate of inheritance, for he shall be punished for waste, and he in reversion or remainder shall enter for forfeiture, and his heir is a special occupant; implicite, as where tenant in tail bargains and sells land to A. and his heirs, A. has an estate descendible and determinable upon the death of the tenant in tail, and yet he has a better estate than the other has, for he shall not be punished for waste, or if he makes a feoffment none shall enter for the forfeiture, and his wife shall be endowed determinable upon the death of the tenant in tail. In pleading in such a case, the life of the tenant in tail should be averred.

It was found by a special verdict in ejectione firmæ, that T. C. devised a certain messuage to H. C., his son and heir, in tail, remainder to I. C. in tail male, remainder to the next heirs male of T. C., and to the heirs male of their bodies, remainder to the next heirs male of the said T. C.; that T. C. died; H. C. entered, and bargained and sold the said messuage, &c.; and that the bargainee entered and was seised, &c. Afterwards H. C. levied a fine with proclamations to the bargainee, with general warranty to him and his heirs against all men; that the bargainee enfeoffed E. S. in fee, who enfeoffed H. S. in fee, who enfeoffed E. L. S. in fee; that I. C. had issue T. and died, and afterwards H. C. died without issue, and that T. was heir to H. C.; that E. L. S. died, leaving the lessor of the plaintiff his son and heir; and that the defendant entered as servant to T. Judgment was given for the defendant, and affirmed in error.

Resolved:—1. By the deed indented of bargain and sale enrolled, the bargainee had an estate descendible to his heirs, determinable upon the death of the tenant in tail; and also, he had the reversion in fee expectant upon the estate in remainder in tail, and the wife of such bargainee was entitled to dower.

2. *The fine levied to the bargainee did not make a discontinuance of the remainder to I. C., but corroborated the estate of the bargainee; and by such fine the estate (with respect to the estate tail in H. C.) is now not determinable till tenant in tail dies without issue.*
3. *The warranty shall not bar the remainders.*
4. *A warranty cannot enlarge an estate.*
5. *The feoffment of the conusee was no discontinuance of the remainder of I. C.*

BETWEEN William Heywood, Gent., plaintiff in *ejectione firmæ* in the King's Bench, and Samuel Smith, defendant, upon a demise made by Edward Seymor, Esquire, 9 *Martii, anno 4 Jac.*, of a house within the parish of St. Anne *infra præcentium Blackfriars, in wardâ de Farringdon infra London*, for three years, &c., and that the defendant had ejected him, &c. The defendant pleaded not guilty; and upon this issue a special verdict was given to this effect:—Sir Thomas Cheyny, Knight, was seised of the said messuage in fee, and 6 *Decemb', anno 1 Eliz.*, by his will in writing devised the said messuage to Henry Cheyny his son (afterwards Lord Cheyny), and to the heirs of his body; the remainder to John Cheyny, and to the heirs male of his body; the remainder to the next heirs male of the said Thomas Cheyny, and to the heirs male of their bodies; the remainder to the next heirs of the said Sir Thomas for ever; and afterwards the said Sir Thomas Cheyny died seised: after whose death the said Henry his son entered into the said messuage, and was thereof seised in tail, with the remainders over in tail, the reversion in fee to him and his heirs, and 18 *Decemb', anno 22 Eliz.*, by an indenture enrolled in the Chancery within six months, for a certain sum of money bargained and sold the said messuage to William Higham, Gentleman, and his heirs, by force whereof he entered and was thereof seised (b) accordingly, and afterwards the said Henry Cheyny, *sc. Octob', Mich. 22 Eliz.*,

(b) "It was upon this finding, and because there was no covenant in the bargain and sale for levying the fine, nor any intention found to have been of levying the fine at that time, that this case must have been adjudged; for otherwise the deed and the

fine would have been but one assurance, and then the fine would have worked a discontinuance." *Doe v. Whitehead*, 2 Burr. 704; Note in Serjeant Hill's Copy; vide note (3), 1 Saund. 261 a.

levied a fine with proclamations of the said messuage to the said William Higham and his heirs, with general warranty to him and his heirs, against all men. William Higham, 19 *Decemb'*, anno 23 Eliz., of the said messuage enfeoffed Edw. Stanhope, Esq., in fee, who, 30 *Jan'*, anno 26 El., enfeoffed Henry Lord Seymor in fee, who, *ult. Oct.*, anno 26 Eliz., of the said messuage enfeoffed Edward Lord Seymor in fee; and that the said John Cheyny in remainder had issue Tho. Cheyny, and died; and afterwards the said Henry then Lord Cheyny died anno 29 Eliz. without issue; and that the said Tho. Cheyny was cousin and heir to the said Henry Lord Cheyny; and the said Tho. Cheyny, 16 *Novemb'*, anno 31 Eliz., entered into the said messuage, claiming the said messuage by force of the said remainder in the said will; and that the said Edward Lord Seymor died, having issue the said Edward, the lessor of the plaintiff, his son and heir, who entered into the said messuage, and made the lease to the plaintiff, as in the declaration is alleged; and that the defendant, as servant of the said Thos. Cheyny, and by his commandment, ejected him, &c. *Et si super totam materiam* the said defendant *legitime intravit necne, juratores præd' ignorant, et petunt inde advisamentum Curia, &c.*

And this case was argued at the bar, and at the bench in the King's Bench, and therein divers points were resolved *per totam Curiam*.

1. That by the deed indented of bargain and sale enrolled, the bargainee had an estate descendible to his heirs, determinable upon the death of the tenant in tail, and also he had the reversion in fee expectant upon the estate in remainder in tail, and that the wife of such bargainee should be endowed. And therewith agrees (c) 24 E. 3, 28 b, in *Caley's Case*; but such dower shall be determinable by the death of the tenant in tail (d).

2. It was resolved, that the fine levied to the bargainee did not make a discontinuance of the remainder to John Cheyny, because it did not touch or displace his remainder, and no estate of freehold passed by the fine, but the fine with proclamations corroborated the estate of the

(c) Cart. 210.

(d) See *Machil v. Clark*, 2 Salk. 619; *S. C.* 2 Ld. Raym. 778; *Goodright v. Mead*, 3 Burr.

1704; *Doe v. Rivers*, 7 T. R. 276; and see the case of *Fines*, 3 Co. Rep. 84; *Took v. Glascock*, 1 Sand. 26.

bargainee (*e*); and by the statutes of (*f*) 4 H. 7, c. 24, and 32 H. 8, c. 36, made his estate more perdurable; for where it was (having regard to the estate tail) determinable upon the death of the tenant in tail, now it is not determinable till tenant in tail dies without issue; but if the (*g*) fine had been levied before bargain and sale enrolled it had been a discontinuance (*h*), as it was resolved in *Hynde's Case* in the fourth part of my Reports, f. 70 b; but in the (*i*) case at bar the fine operated upon the estate precedent, which passed by the bargain and sale, and is guided by the precedent estate, and no conclusion; for he may confess and avoid, as in (*j*) 6 R. 2, Estoppel, 111.

3. It was objected, that where by the feoffment of the bargainee the remainder of J. Cheyny was displaced (*k*) and put to a (*l*) right, so as the warranty in the fine descended upon John Cheyny, who has but a right, and therefore shall bar him: it was unanimously resolved, *per totam Curiam*, that this (*m*) warranty should not bar the remainder for divers reasons. 1. Because every warranty ought to be knit and annexed to an estate, for every warranty (*n*) has its essence by dependency upon an estate; and in this case at the time of the fine levied the warranty was annexed to the fee simple, determinable upon the death of the tenant in tail without issue, and to the reversion in fee; but did not extend to the estate of John Cheyny in the remainder, for that was not then displaced or divested, but continued in him, for John

(*e*) 1 Bulst. 162, 163, 164; Co. Litt. 332 b; Cro. Car. 126, 321; Moore, 28, 220, pl. 359; 9 Co. 106 a; 10 Co. 97 a.

(*f*) Co. Litt. 262 a, 372 a, b, 326 a; 2 Inst. 519; 3 Inst. 216; 1 Leon. 77, 213; 2 Leon. 53, 167; 3 Leon. 10, 221, 227; 1 And. 170; Poph. 108, 114; 3 Co. 77 b, 78 b, 79 a, 86 b, 87 a, b, 88 a, b, 89 a, 90 a, b, 91 a; 4 Co. 125 b; 7 Co. 32 b; 9 Co. 104 b, 105 a, b; Cro. Eliz. 561; Sav. 85, 88; Palm. 255; Golds. 171, 172; Plowd. 360 b, 371 b; 3 Bulst. 162; Dy. 72, pl. 3, 153; pl. 2, 186; pl. 68, 216; pl. 32, 224; pl. 28, 254; pl. 104, 256; pl. 9, 270; pl. 22.

(*g*) Cro. Car. 218, 321; 1 And. 27, 113, 285, 286; 2 And. 161; O. Ben. 13, 14; Hob. 222; Owen, 69, 70; Poph. 49; Cro. Eliz. 917; 2 Inst. 671, 672; Godb. 218;

1 Leon. 6; 3 Leon. 1; 2 Jenk. Cent. 5, 51; 1 Bulstr. 163; 2 Bulstr. 34; Moore, 337, 338, 680, 681; 1 Co. 120 b.

(*h*) For then at the time of levying the fine the conusor would have been tenant in tail in possession, which it is necessary he should be, in order to work a discontinuance. *Doe v. Jones*, 1 Barn. & Cress. 238; *S. C.* 2 Dowl. & Ry. 273.

(*i*) 4 Co. Rep. 91 a.

(*j*) 1 Bulst. 164; Cro. Eliz. 917; 6 R. 2, "Estoppel," 211; 2 Co. 74 b, 78 a.

(*k*) Cro. Car. 166; 9 Co. 106 a; Jenk. Cent. 51.

(*l*) 9 Co. 106 a.

(*m*) Jenk. Cent. 51.

(*n*) 1 Bulst. 163, 166 et infra.

Cheyney at the time of the fine levied, and after, was seised of his remainder. Then if the warranty at the time of the creation of it be annexed to an estate, the conusee by his feoffment or other act cannot extend it farther than it was at the time of its creation; and therefore when the estate tail, to which the warranty is annexed, is determined by the death of the tenant in tail without issue, the warranty, which had its essence by dependency, is also (n) determined, for then there is no estate which will support it (o): and therefore it was agreed, that if a man makes a gift in tail, and warrants the land to him and his heirs, and afterwards tenant in tail makes a feoffment in fee, and dies without issue, the feoffee shall not (p) rebut the donor in a *formedon* in the reverter, because the estate to which the warranty is annexed is determined: but it is held in 7 E. 3, 34 and 35, that if a man makes a gift in tail, and warrants the land to him, his heirs and assigns, and afterwards tenant in tail makes a feoffment in fee and dies, he shall rebut the donor by force of the said warranty in a *formedon* in the reverter: and this book is cited by Wilby in (q) 46 E. 3, 4 b, which book is good law, if it be intended of a gift in tail made before the statute *De donis conditionalibus*, for then the warranty was annexed to an estate in fee simple, and the donor had but a possibility of reverter, which might be barred by a collateral warranty. *Vide* (r) 45 Ass. pl. 6, and Plowd. Com. in the *Lord Barkley's Case*, 234 a. But when a man makes a gift in tail with warranty after the statute, this warranty, in what manner soever it be made, cannot extend to bar the reversion in fee; for the estate to which the warranty extends is determined by the death of tenant in tail without issue; and as hath been said, a feoffment or other act done by the donee subsequent shall not extend the warranty further than the estate tail, to which the warranty at the time of the creation of it was annexed. 2. It is a maxim in the law, that no (s)

(n) Cart. 240.

(o) *Hunt v. Burn*, 1 Salk. 244; *Smith v. Tyndal*, 2 Salk. 686; Touch. 188.

(p) Co. Litt. 385 a; 1 Bulst. 166; 3 Co. 63 a; Vaugh. 389.

(q) Co. Litt. 385 a; 1 Bulst. 166; 3 Co. 63 a; Vaugh. 388; Br. "Formed." 57; Plowd. 436 b; Fitz. "Garrantie," 18; Statham,

"Garrantie," 4.

(r) Co. Litt. 19 b, 370 b; Plowd. 234 a, 553 b; Fitz. "Garr." 68; Br. "Assets per Descent," 31; Br. "Tail," 34; Br. "Pregog." 52; Br. "Serche pur le Roy," 5; Br. "Garran." 52.

(s) 9 Co. 106 a; Co. Litt. 327 b.

warranty shall extend to bar any estate of freehold (*t*) or inheritance which is *in esse* in possession, reversion or remainder (and not displaced and put to a right) before or at the time of the warranty made, although afterwards and at the time of the descent of the warranty the estate of freehold or inheritance be displaced and divested (*u*). And therefore if there be father and son, and the (*v*) son has a rent service, rent charge, or rent seck, or common of pasture issuing out of certain land, and the father releases to the tenant of the land with warranty and dies, it shall not bar the son, for of the rent or common the son was (*x*) actually seised at the time of the warranty made, and he who is in possession need not put in his claim, either to avoid a fine or collateral warranty; and in the same case, although the son after the warranty made was (*y*) disseised of the rent or common, and afterwards the father dies, that shall not bar him, because the warranty at the time of the creation of it did not extend to any estate of freehold or inheritance *in esse* at the time of its creation; but if the son be disseised of the rent or common, and affirms himself to be disseised by (*z*) bringing of an assize (*a*), and afterwards the father releases with warranty and dies, there the collateral warranty shall bar the son of his rent or common, because he had but a bare right at the time of the warranty made. *Vide* (*b*) 31 Ass. p. 13 (38); 22 Ass. p. 36; 41 Ass. p. 6; 33 E. 3, "Garranty," 74. So if (*c*) my collateral ancestor releases to my tenant for life and dies, it shall not bind me, because the reversion continues in my person; but if any tenant for (*d*) life be disseised, and my ancestor releases to the disseisor with warranty, and dies, it shall bind me, because as well the estate of the tenant for life as my

(*t*) Co. Litt. 327 b, 388 b; 9 Co. 106 a; 1 Anders. 37, 38.

(*u*) *Hunt v. Burn*, 1 Salk. 245; *Stephen v. Butridge*, 1 Lev. 37; 1 Sid. 83; Raym. 36; Touch. 187.

(*v*) Co. Litt. 388 b.

(*x*) Ibid.

(*y*) Ibid.

(*z*) 1 Co. 140 a.

(*a*) Without an assize, the son shall not be said to be out of possession of a rent or common, &c.; for a man cannot be disseised of a rent, &c., except at his election;

and disseisin at election is merely a supposition for the sake of the remedy by assize. Now, by statute 4 & 5 Anne, c. 16, all collateral warranties by any ancestor, who has no estate of inheritance in possession of the lands, tenements, &c. warranted, are void against the heir.

(*b*) 31 Ass. 13; Br. "Charge," 29; Br. "Estate," 34; Br. "Garrant," 50; Br. "Extinguishment," 30.

(*c*) Co. Litt. 381 b.

(*d*) 1 Co. 67 a; 2 Roll. 740.

reversion was devested out of me at the time of the warranty made; and with this (e), (43) 45 E. 3, 3, 21 b, and 21 H. 7, 11 a, agree.

4. It was clearly resolved, that a warranty cannot (f) enlarge an estate: 22 H. 6, 15 b; 19 H. 6, 73 b; 20 H. 6, 73; 2 H. 4, 13 a; 43 E. 3, 17 b; 43 Ass. p. 42. *Vide* 12 Ass. p. 17; 12 E. 4, "Tail," 3; 21 E. 4, 16 b; 44 E. 3, 10 b; 44 Ass. Bassingborn's Assise.

5. It was resolved, that the feoffment of the conusee was no discontinuance (g) of the remainder of Jno. Cheyny, so that his entry shall be tolled, for none can discontinue the remainder or reversion, but he only to whom the land was entailed: and therefore if tenant in tail grants *totum statum suum* to one, and he makes a feoffment in fee, it shall not toll the entry of him in the remainder or reversion.

6. It was resolved, that if the (h) collateral warranty should bind, it might be well given in evidence, and found by the jury, although some opinions *obiter* be to the contrary in 22 Ass. p. 37, and 7 H. 5, 6 a. *Vide* 34 E. 3, tit. (i) "Droit," 29. For although a collateral warranty (k) gives not a right, yet in law it bars and binds a right, and therefore may be given in evidence; and *eo potius*, because now in (l) *ejectione firmæ*, and other personal actions, it cannot be pleaded by way of bar, 15 E. 4, "Entre," 42; 20 H. 7, 4 a; 1 H. 7, 12 a; 21 H. 7, 32 a; 3 E. 4, 4 b; 8 E. 4, 19; 21 E. 4, 82 b; 22 E. 4, 4 a, b; 3 H. 6, 27, 36 b; 20 H. 6, 44 a, b; 35 H. 6, "Trespas," 160; 27 H. 8, 22 b. And that a collateral warranty may be given in (m) evidence, and found by the jury upon not guilty pleaded in *ejectione firmæ*, appears in the first part of my reports in (n) *Chudleigh's Case*. And according to these resolutions in *Trin. 9 Jac. Regis*, judgment was given for the defendant. Whereupon the plaintiff brought a writ of error upon the new statute in the Exchequer Chamber, where it was resolved in this very term by all the Justices of the Common Pleas and Barons of the

(e) Statham, "Garranty," 3.

(f) Co. Litt. 333 b, 385 b; 12 Ass. 16; 44 Ass. 35 f, 295 b; Perk. ss. 165, 166; 1 Bulst. 164, 166; Statham, "Garr." 4; 1 Co. 85 a; Fitz. "Feoffm." 8; Br. "Estate," 18, 73; Fitz. "Annuity," 16; Br. "Garranty" 10.

(g) 1 Bulst. 163, 164, 165; Moore, 28, 220, pl. 359; Cro. Car. 156, 321; Co. Litt.

332 b; 10 Co. 96 a.

(h) 1 Bulst. 165, 167; Co. Litt. 227 a, 283 a; 2 Roll. 690.

(i) 34 E. 3; Fitz. "Droit," 29.

(k) 2 Roll. 690; 10 Co. 90 a, b.

(l) Doct. pl. 85; 2 Salk. 685; 1 Salk. 245.

(m) 1 Bulst. 167; Doct. pl. 185.

(n) 1 Co. 120 b; and see ante, p. 200.

Exchequer, that the judgment given by the Judges of the King's Bench should be affirmed; and that the warranty did not bind the remainder of John Cheyny, for the reasons and causes before recited without any great difficulty. *Nota*, reader, every (o) estate descendible to the heir is either an estate of inheritance or an estate of freehold. An estate of inheritance is either fee simple or fee tail; an estate of fee simple is either an estate of inheritance absolute and indeterminable, as where lands are given to a man and his heirs, he has such a pure and absolute estate which can never determine; or a fee simple determinable, and that is in two manners, sc. either expressly derived out of an absolute and pure estate in fee simple, or implicit and derived out of an estate tail; out of an absolute estate in fee also in two manners,—first, by condition, as upon mortgage, and that is called a fee simple conditional; secondly, by limitation, as if A. enfeoffs B. of the manor of D., to have and to hold to him and his heirs, so long as C. has heirs of his body, and that is called a fee simple limited and qualified; and in both these cases the whole estate in the land is in the feoffee; and therefore no (p) remainder or reversion can be expectant upon either of them; implicit and derived out of an estate tail, as in the case at bar; when tenant in tail bargains and sells the said messuage by deed indented and enrolled to William Higham and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple, as long as the tenant in tail has heirs of his body, derived out of the estate tail; and this is a more inferior and subordinate estate in fee simple than the other two aforesaid, for upon *this* a remainder or reversion may be expectant, and yet in (q) all these cases he who has any such estate of inheritance may plead that he is seised of the land in his demesne as of fee, without showing the beginning of his estate, as well when he has a fee simple derived out of an estate tail, as a fee simple conditional or limited. An estate of freehold descendible, in like manner is either expressed or implied; expressed, as if a man devises land to one and his heirs (r) during the life of

(o) Co. Litt. 1 b.

(p) Co. Litt. 18 a; Palm. 188; Hutt. 60; 2 Leon. 114; 2 Roll. Rep. 216, 220; Vaugh. 269; 2 Roll. 791; Plowd. 235 a, 232 b, 248, 499 a.

(q) Doct. pl. 287; Cart. 211; Litt. sect. 739.

(r) 1 Co. 140 b; Br. "Estates," 50; Hob. 323; Yelv. 9; Plowd. 556 b; 1 Bulst. 135; B. N. C. 14; 3 Keb. 487; Dyer, 253, pl. 99.

J. S., or tenant for life grants his estate to (s) one and his heirs; in these cases the lessee or grantee has an estate of freehold descendible, but no estate of inheritance, for he shall be punished (t) for waste, and he in reversion or remainder shall enter for forfeiture, and his heir shall not have his (u) age, for he in a manner is but a special occupant (w); nor shall he be in respect thereof charged as heir in an action of debt; implicite, as where in the case at bar tenant in tail bargains and sells the land to William Higham and his heirs, he has an estate descendible and determinable upon the death of the tenant in tail, and yet he has a better estate than the other has, for he shall not be punished for waste (x); or if he makes a feoffment none shall enter for the forfeiture, and his wife shall be (y) endowed, determinable upon the death of tenant in tail; and yet (z) you pleaders look well to it, that in such case you do not begin your plea, that the bargainee in such case *fuit seisitus in dominico suo ut de feodo*, but (a) the sure is to plead the special matter, and to aver the life of the tenant in tail.

And so you will the better understand your books, s. Litt. 3 b, cap. "Tail," and cap. "Garranty;" 7 E. 4, 12; 9 E. 4, 26 a; 15 Ed. 4, 8; 2 H. 4, 13; 21 H. 7, 4; 18 E. 3, 12; 13 H. 7, 10; 18 H. 8, 3 b; 11 H. 4, 42; 7 H. 4, 46; 8 H. 4, 15; 17 E. 3, 48; 19 E. 3, "Account," 56; 33 Ass. pl. 17; 27 Ass. pl. 31; 22 H. 6, 33; 39 E. 3, 25; 22 E. 5, 19; 27 H. 8, 20; 21 H. 8, *titulo* Estates, 28, 50; 8 El., Dy. 253; 24 Ed. 3, 28 b; 9 Ed. 4, 19; Plowd. Com. in *Walsingham's Case*, 555.

And I conceive that in the case at bar, the remainder of John Cheyny by the feoffment of the conusee to Edward Stanhope and his heirs was not displaced, nor put to a right; for the conusee had a fee simple determinable upon the death of Henry Lord Cheyny without issue of his body, and when he made the feoffment his determinable fee-simple in possession, and his absolute fee-simple expectant upon

100; Co. Litt. 239 a, 110 b; Fitz. "Account," 56; Cro. Jac. 282; 2 Roll. 66; Moor, 726. See ante, pp. 32—36, note to *Lewis Bowler's Case*.

(s) Co. Litt. 41 b.

(t) Co. Litt. 41 b, 44 b, 54 a; 2 Roll. 826; 6 Co. 37 b; 2 Inst. 301; Plowd. 151, 556 b.

(u) Dyer, 321, pl. 22; Co. Litt. 239 a; Anders. 21.

(w) See ante, note to *Rouse's Case*.

(x) 1 Bulst. 165.

(y) 10 Co. 96 a; 3 Co. 84 b; Cart. 210.

(z) Cart. 209.

(a) Doct. pl. 287.

the estate tail of John Cheyny in the remainder shall pass, and shall not divest the remainder of John Cheyny; for the feoffment which in himself is not tortious, cannot be tortious to another. But where tenant for life or tenant in tail makes a feoffment, the feoffment in itself is tortious; for tenant for life or in tail cannot give in fee, and therefore the feoffment itself is tortious; and in case of an estate tail is tortious as to his issues: but when he who has a fee simple, although it be determinable, makes a feoffment in fee, he who has the fee simple gives a fee simple, and thereby he doth no wrong to his heirs, and by consequence no wrong to him in the remainder. Also the estate tail by the said fine is utterly barred, and a new estate in fee simple created.

Nota also, reader, there are some titles to which a (b) warranty doth not extend, as the title in case of discharge (c), condition upon mortgage, &c., mortmain, consent to ravisher, and the like; because for these no action lies, in which there can be voucher or rebutter, neither can a descent toll the entry in such cases; and they continue in such plight and possession as they were by their original creation; and they by no act can be displaced or divested out of their original essence. *Vide* 34 E. 3, "Garranty," 72. A collateral warranty shall not bar a title of dower, for *that* continues the essence according to the original creation, and yet for *that* an action is given; and therefore there is a difference between a collateral warranty, and a fine levied, and five years passed; for upon a fine and five years passed all the said titles are bound; and the title of (d) dower also, if an action be not brought within the time prescribed by the statute. *Vide* Plowd. Com. 373 a.

(b) Co. Litt. 389 a; 33 E. 3, "Garranty," 74.

(c) *Quere*, if instead of the word "*discharge*," it should not be "*exchange*." *Vide* Co. Litt. 389 a; Com. Dig. "Garranty," G.

(d) Cro. Jac. 333; 10 Co. 49 b; Co. Litt.

326 a; 6 E. 2, "Dower," 145; 19 E. 2, "Dower," 165; Cro. Car. 201; 9 Co. 140 b; Dyer, 72, pl. 3; 224, pl. 28; 2 Co. 93 a; 10 Co. 49 b; 1 Roll. Rep. 160; 3 Inst. 216; Moore, 53; 2 Roll. Rep. 69, 409; Goldsb. 184; 3 Leon. 50, 221; Palm. 235.

Edward Seymor's Case and *Taltarum's Case* are printed together as leading authorities, because the former contains an admirable classification by Lord Coke of estates of inheritance, which, together with some of their principal incidents, it is proposed to consider in this note; and because the latter is generally supposed to be the first case by which our Courts of Justice, in effect repealing the statute *De donis conditionalibus*, set lands free from the fetters of perpetual entails, and again yielded them up to the purposes of alienation and commerce.

I. *Fee Simple absolute and indeterminable.*

Adopting then the order of Lord Coke, we will examine, first, the fee simple absolute or indeterminable, or, as it is called in Latin, "*feodum simplex*," which is the greatest estate a person can have at law. It must, indeed, be held of a superior lord, either immediately, as from the crown, or from some intermediate lord, interposed between the tenant and the crown; but the burdens of feudal tenure are (with some exceptions which will be noticed hereafter) no longer in existence, having been abolished by 12 Car. 2, c. 24.

The principal incidents of estates in fee simple, are as follow:—1. Where the owner is not under any incapacity, he has complete power of voluntary alienation, by deed or will; and any condition in restraint of this power, except in the case of property settled to the separate use of a married woman, is void as repugnant to the estate. See *Bradley v. Peixoto*, post, and note.

Where, however, the conveyance is to a corporation it will be invalid, unless the licence of the crown be obtained (7 & 8 Will. 3, c. 37); or it has power under an act of parliament to take land without such licence; and a conveyance in favour of a charity must comply with the regulations prescribed by 9 Geo. 2, c. 36; and a devise to a charity, of land or anything savouring of land (except in certain cases), is absolutely void. See *Corbyn v. French*, and note, ante, p. 408.

Involuntary alienation of lands in fee simple takes place upon the bankruptcy or insolvency of the owner; and in the former case, immediately upon the appointment of assignees, all his lands, tenements and hereditaments vest in them, for the benefit of the creditors (12 & 13 Vict. c. 106, ss. 142, 148; 2 Steph. Com. 137, 157); in the latter case (amongst other things), the real estate is, by means of what is termed a *vesting order*, vested in an officer of the Court termed a provisional assignee. 1 & 2 Vict. c. 110, s. 37; 2 Steph. Com. 168, 171.

Voluntary alienation by act inter vivos takes place not only by a deed, but by a contract to sell, which though executory and incomplete at law, is

considered by Courts of Equity, to amount to a complete alienation, and they will enforce the execution thereof by a proper legal conveyance.

What Words will confer an Estate in Fee Simple by Deed.

In conveying a fee simple by deed, proper words of inheritance must be used, as "to A. and his heirs;" if the conveyance were "to A. for ever;" "to A. and his assigns for ever;" A. would only take an estate for life. Litt. s. 1.

So if there be a conveyance to a man *or* his heirs, or to two persons *et herædibus*, omitting "*suis*," or to a man and his successors, he will take only a life interest (Co. Litt. 8 b; and see *Hogan v. Jackson*, Cowp. 306). Though it seems, that if land were conveyed to one man *et herædibus* omitting "*suis*," the fee would pass. *Ib.* *

It is observed by Coke, that where the conveyance is "to a man and to his *heir*" in the singular number, he has but an estate for life; for his heir cannot take a fee simple by descent, because he is but one, and therefore in that case, his heir shall take nothing" (Co. Litt. 8 b); but it is said by Hargrave, in his note to Coke, that according to many authorities, *heir* may be *nomen collectivum*, as well in a deed as a will, and operate in both in the same manner as heirs in the plural number. *Ib.* note 45, where he refers to 1 Roll. Abr. 832 k, pl. 1, 2; Godb. 155; T. Jo. 111; Cro. Eliz. 313; Robins. Gavelkind, 95, 96; 1 Burr. 38; Vin. Abr. "Devise," U, a, pl. 13, and "Parols," H. And see and consider *Chambers v. Taylor*, 2 My. & Cr. 376 and the cases there cited.

Although the mode of construing deeds is so strict, the word "heirs" in the latter part of a sentence, has been referred to words in the preceding part. Thus in *Doe v. Martin*, 4 T. R. 39, where there was a conveyance to the use of all and every the child or children of a marriage equally, share and share alike, to hold the same, if more than one, as tenants in common and not as joint tenants; and if but one child, then to such only child, his or her heirs or assigns for ever. It was held by the Court of King's Bench, that the children took a fee simple; Lord Kenyon observing, that he could not bring himself to doubt but that the words "his or her heirs," might with propriety, and ought, considering the whole settlement, and the manifest intention of the parties, to act as words of limitation on all the preceding words in the sentence. See also *Garde v. Garde*, 3 Dru. & Warr. 435; 2 Conn. & Laws. 175.

There are, however, certain exceptions to the rule, that words of limitation are necessary to pass a fee simple by deed. Thus in the case of a fine

sur conusance de droit come ceo qu'il ad de son done, and of a recovery (both since abolished), or of a release from one coparcener or joint tenant of lands in fee simple to another, or of a release by way of *extinguishment*, as from a lord to a tenant, or from the grantee of a rent where it extends to "*all his right*," or of a release of a bare right, as that of a disseisor, or of the grant of a rent from one coparcener to another for equality of partition, the fee passes without the use of the word "*heirs*." See Co. Litt. 9 b.

Another exception may be mentioned, where a fee passes without words of limitation by words of reference; for it is laid down by Coke, that if a father enfeoff his son, to have and to hold to him and to his heirs, and the son enfeoff the father as fully as the father enfeoffed him, by this the father hath a fee simple quia verba relata hoc maxime operantur per referentiam ut inesse videntur. See also *Garde v. Garde*, 3 Dru. & Warr. 435; 2 Conn. & Laws. 175.

In the case of a conveyance to a corporation, aggregate or sole, the proper words of limitation are, to him or them and his or their *successors*, and *not heirs*. In the case, however, of a corporation *aggregate*, the word "*successors*" is not *essential*. "For the diversity," observes Coke, "standeth thus between a corporation aggregate of many capable persons and a sole corporation. As if lands be given to a dean and chapter, they have a fee simple without the word '*successors*,' for *that the body never dies*; but if land be given to a bishop, parson or any other sole corporation, *who after their deceases have a succession*, there, without the word '*successors*,' nothing passeth unto them but for life." Co. Litt. 94 b; and see Ib. 8 b.

If a man give lands to the king by deed enrolled, a fee simple passes, without the words "*successors or heirs*," because in contemplation of the law the king never dies. Co. Litt. 9 b.

Coke observes, "The reason wherefore the law is so precise to prescribe certain words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion." Co. Litt. 9 a.

It is to be regretted that the same precision has not been deemed essential in the case of wills, for its absence, as we shall hereafter see, has given rise to much litigation.

As to what words will give the fee according to the rule in *Shelley's Case*, see ante, p. 480. See further on this subject, 2 Prest. Est. 1—68.

It may here be mentioned, that where a person contracts to purchase an estate, although the agreement does not say that it is to be conveyed to him and "*his heirs*," nevertheless, the agreement being merely executory, a Court of Equity will direct a conveyance to the purchaser and his heirs.

As to what Words will create an Estate in Fee Simple by Will.

The proper and technical mode of conferring an estate in fee in wills (not coming within the operation of the Wills Act, 1 Vict. c. 26, s. 28) is the same as that which, we have already seen, is necessarily adopted in deeds, viz. by a devise to a *man and his heirs*; but as in wills the intention is more regarded than mere technical words, it will be found, upon an examination of the cases even before the Wills Act, that where the words made use of are such as to show the testator's intention that the devisee should have the fee, he will take such estate, even in the absence of words of limitation. These cases it is now proposed to examine.

It may be laid down as a general rule, by analogy to the rule of construction, which prevails as to conveyances at common law, that where there is a devise, without words of limitation and without words which, as we shall hereafter see, have been considered equivalent thereto, as denoting the intention of the testator to give the fee to the devisee, he will only take an estate for life (*Hogan v. Jackson*, Cowp. 306). Where, therefore, there is a devise of property, under the description of messuages, houses, lands, tenements (*Roe d. Kirby v. Holmes*, 2 Wils. 80; *Roe v. Blackett*, Cowp. 235; *Doe d. Burton v. White*, 1 Exch. 526; 2 Exch. 797; *Doe d. Roberts v. Roberts*, 7 Mees. & W. 382), manors (*Paice v. Archbishop of Canterbury*, 14 Ves. 364), perpetual advowsons (*Pocock v. Bishop of Lincoln*, 3 Brod. & Bing. 27), and even of hereditaments (*Hopewell v. Achland*, 1 Salk. 239; *Canning v. Canning*, Mos. 240; *Denn d. Moor v. Mellor*, 5 T. R. 558; 6 T. R. 175; 1 Bos. & Pul. 558; 2 Bos. & Pul. 247; *Doe d. Small v. Allen*, 8 T. R. 503; sed vide *Lydcott v. Willows*, 3 Mod. 229; *Smith v. Tindal*, 11 Mod. 103), without words of limitation, the devisee will only take a life interest.

As in the absence of words of limitation there must be a clear intention to give an estate in fee to another, so as to control the rule of law and exclude the heir, it has been held that mere introductory words, apparently descriptive of the testator's desire to dispose of all his estate (*Doe d. Child v. Wright*, 8 T. R. 64; *Doe d. Small v. Allen*, Ib. 497), or the devise of an express estate for life in another part of the will (*Goodtitle d. Richards v. Edmonds*, 7 T. R. 635; *Doe d. Viner v. Eve*, 5 Ad. & Ell. 317), or a gift to his heir-at-law of a previous life interest (*Anse v. Melhuish*, 1 Bro. C. C. 519; *Right d. Compton v. Compton*, 9 East, 267), or of a legacy, whether it be substantial or nominal, agreeable to the vulgar notion taken from the Roman law that the heir is cut off with a shilling (*Denn v. Gaskin*, Cowp. 657, 660; *Roe d. Callow v. Bolton*, 2 Wm. Black. 1045; *Right v. Sidebotham*, 1 Dougl. 759), will not afford sufficient evidence of

an intention to confer a fee simple, so as to exclude the heir. And indeed, however apparent may be the intention of excluding him, he will inherit as a matter of course, unless the fee be either expressly or by manifest implication given to some one else. *Denn v. Gaskin*, Cowp. 657, 661.

Where words are used in wills made before the 1 Vict. c. 26, which, though not technical, are equivalent to words of limitation; for instance, where there is a devise to A. and heirs (Br. "Estates," pl. 4; 8 Vin. Abr. 208, pl. 18), to A. or his heirs (*Read v. Snell*, 2 Atk. 645), to A. or his executors (*Rose d. Vere v. Hill*, 3 Burr. 1881; *Reynell v. Reynell*, 10 Beav. 21), to A. and his house or family (*Chapman's Case*, Dyer, 333; *Wright v. Athyns*, 17 Ves. 261), stock (*Counden v. Clerke*, Hob. 33) or blood (Co. Litt. 9 b; *Downhall v. Catesby*, 8 Vin. Abr. 206, pl. 10), or to A. for ever (*Whiting v. Welkings*, 8 Vin. Abr. 206, pl. 6; 1 Bulst. 219), to A. and his assigns for ever (Co. Litt. 9 b; *Timewell v. Perkins*, 2 Atk. 102); in all these cases A. will take an estate in fee simple. *Secus*, if the devise were only to A. and his assigns, as in such case he would only take an estate for life. Co. Litt. 9 b.

Where lands were left to a person (previous to 1 Vict. c. 26) indefinitely and without any words of limitation, the life interest which he would otherwise have taken might be enlarged into a fee simple, although he were likewise executor (*Dolton v. Herwen*, 6 Madd. 9; *Doe v. Phillips*, 3 B. & Ad. 753; *Johnson v. Brady*, 11 Ir. Eq. Rep. 386), by the testator directing him to pay his (the testator's) debts or legacies, or any sum in gross (*Moone v. Heaseman*, Willes, 140; *Doe v. Holmes*, 8 T. R. 1; *Goodtitle v. Maddern*, 4 East, 496; Co. Litt. 9 b), or annuities (*Spicer v. Spicer*, Cro. Jac. 527; *Baddeley v. Leppingwell*, 3 Burr. 1533; *Jenkins v. Jenkins*, Willes, 650; *Goodright v. Stocker*, 5 T. R. 13; *Right v. Compton*, 9 East, 267; *Crozier v. Crozier*, 3 Dru. & Warr. 384; *Morrough v. Lord Dufferin*, 2 Jo. Ir. Ex. 719), either himself simply or out of the land. *Doe v. Snelling*, 5 East, 87.

The ground upon which this rule proceeds is, that unless the devisee took the fee, he might be a loser by the devise, which it could not be supposed that the testator intended that he should be (*Moone v. Heaseman*, Willes, 141). The mere possibility of loss is sufficient for the application of the rule, so that although the charge is very small in amount in proportion to the value of the estate (*Doe v. Holmes*, 8 T. R. 1; *Goodtitle v. Maddern*, 4 East, 496), or being contingent may never arise (*Merson v. Blackmore*, 2 Atk. 341; *Doe v. Allen*, 8 T. R. 497; *Abrams v. Winshup*, 3 Russ. 350; *Doe v. Phillips*, 3 B. & Ad. 753), the rule will nevertheless be applicable, and the estate enlarged into a fee.

Where, however, there is no personal duty imposed on the devisee to pay

either gross sums as debts or legacies (*Denn v. Mellor*, 5 T. R. 558; *S. C.* 1 Bos. & Pul. 558; *Fairfax v. Heron*, Prec. Ch. 67), or annuities (*Doe v. Clayton*, 8 East, 141), but the land is devised to him, *after* or *subject to their payment*; then, according to a well-known distinction, no enlargement of his estate will take place, and he will only be entitled to a life estate. See *Doe d. Clark v. Clark*, 1 Crompt. & Mees. 39; *Vick v. Sueter*, 3 Ell. & Bl. 219; overruling *Doe v. Richards*, 3 T. R. 356; *Gully v. Bishop of Exeter*, 12 Moore, 591.

Nor is this rule applicable where there is an express devise of an estate for life (*Willis v. Lucas*, 1 P. Wms. 472; *Goodtitle v. Edmonds*, 7 T. R. 635), or an estate tail whether arising from a devise in express terms or by construction of law (*Denn v. Slater*, 5 T. R. 335; *Doe v. Owens*, 1 B. & Ad. 318), as such estates will not be enlarged into a fee, by any payment, either of a gross sum or an express annuity for life, directed to be made by the devisee.

Where land is devised to a person without words of limitation, and there is a gift over either in fee or for life, on *his dying before* a particular age, as before twenty-one, such gift over has been held to show an intention, that if the party attain twenty-one he should have a fee simple absolute (*Frogmorton v. Holyday*, 3 Burr. 1618; *Doe v. Cundall*, 9 East, 400; *Marshall v. Hill*, 2 Mau. & Sel. 608; *Doe v. Coleman*, 6 Price, 179); and it is immaterial that another contingency, as for instance, the dying "without leaving lawful issue," is coupled with that of the devisee dying before twenty-one (*Toovey v. Bassett*, 10 East, 460; *Moone v. Heaseman*, Willes, 138); but it will not be presumed to have been the intention of the testator to give a fee where the gift over is wholly independent of the death of the first devisee. *Roe v. Blackett*, Cowp. 235.

In the converse case, where a devise over without words of limitation takes effect, in the place of a previous devise in fee, it will not be thereby enlarged into an absolute interest, as it will only defeat the prior estate pro tanto. *Fairfax v. Heron*, Prec. Ch. 67; *Roe v. Holmes*, 2 Wils. 80; *Middleton v. Swain*, Skinn. 339; *Beveston v. Hussey*, Ib. 385.

It seems, where the legal estate is given to trustees in fee, and the beneficial interest is given without words of limitation, that the cestui que trust will take an equitable interest equal to that of the trustees. See *Bateman v. Roach*, 9 Mod. 104; *Challenger v. Shepherd*, 8 T. R. 597; *Hutchinson v. Stephens*, 1 Keen, 240; *Knight v. Selby*, 3 Man. & Gr. 92; 3 Scott, N. R. 409; *Moore v. Cleghorn*, 10 Beav. 423; 12 Jur. 591; *Hodson v. Ball*, 14 Sim. 558. And see and consider the cases of *Nerland v. Shephard*, 2 P. Wms. 194; *Peat v. Powell*, 1 Eden, Rep. 479; *Fonereau v. Fonereau*, 3 Atk. 315.

It also seems that in the converse case, where lands are devised in trust for a person in fee, the trustees will take a fee although there be no words of inheritance, or words equivalent to them. *Shaw v. Weigh*, 2 Stra. 798.

In wills even before 1 Vict. c. 26, words descriptive of a fee simple, or of the whole interest in the property will pass the fee. Thus a devise to A. "in fee simple" (*Baker v. Raimond*, Anders. 518; 8 Vin. Abr. 206, pl. 8) or of all "my estate" (*Ibbetson v. Beckwith*, Ca. t. Talb. 157; *Tuffnell v. Page*, 2 Atk. 38; *Ridout v. Pain*, 3 Atk. 486; *Doe v. Woodhouse*, 4 T. R. 89, 93; *Doe v. Williams*, 1 Exch. 414) or "estates" (*Fletcher v. Smiton*, 2 T. R. 656; *Roe d. Allport v. Bacon*, 4 Mau. & Sel. 366; *Cookson v. Bingham*, 3 De Gex, Mac. & Gord. 668), although referred to as being "at" or "in" (*Barry v. Edgemorth*, 2 P. Wms. 523; *Tuffnell v. Page*, 2 Atk. 37; *S. C.* Barn. Ch. Rep. 9; *Holdfast d. Comper v. Marten*, 1 T. R. 411; *Uthwatt v. Bryant*, 6 Taunt. 317; *Macaree v. Tall*, Amb. 181; *Denn d. Richardson v. Hood*, 7 Taunt. 35), or "of" a particular place (*Chichester v. Oxendon*, 4 Taunt. 176; *S. C.* 4 Dow, 92), known by a particular name (*Roe d. Child v. Wright*, 7 East, 259), or purchased from (*Bailis v. Gale*, 2 Ves. 48), or in the occupation of, another person (*Gardner v. Harding*, 3 J. B. Moore, 565; *Paris v. Miller*, 5 Mau. & Sel. 408), or of the testator himself (*Denn d. Richardson v. Hood*, 7 Taunt. 35; *Doe d. Pottow v. Fricker*, 6 Exch. 510), will confer an estate in fee simple on A., although the word "estate" be used in another part of the will, in an express devise for life (*Randall v. Tuchin*, 6 Taunt. 410; *Ibbetson v. Beckwith*, Ca. t. Talb. 157; *Wilkinson v. Chapman*, 3 Russ. 145; sed vide *Doe d. Lean v. Lean*, 1 Q. B. 229; 4 P. & D. 662. The decision of *Pettinard v. Prescott*, 7 Ves. 541, may be considered as overruled.

Mere introductory words in the will containing the word "estate," such as "as to all my worldly estate," will not of themselves enlarge into a fee a devise of lands, not described so as to pass such estate (*Frogmorton v. Wright*, 2 Wm. Black. 889; *Loveacres d. Mudge v. Blight*, Cowp. 352; *Denn d. Gaskin v. Gaskin*, Ib. 657; *Doe d. Small v. Allen*, 8 T. R. 497; sed vide *Grayson v. Atkinson*, 1 Wils. 333), although they may if the word "estate" is made use of in such a manner as to comprehend the subsequent devise (*Gall v. Esdails*, 8 Bing. 323; 1 Moo. & Sc. 466; sed vide *S. C.* 1 Russ. & My. 540).

Although, after a devise of an "estate" with or without words of locality, to a person for life, if "the same" be given to another person, the fee would thereby pass (*Challenger v. Shepherd*, 8 T. R. 597; sed vide *Wight v. Leigh*, 15 Ves. 564), this would not be the case if there were no reference to the former gift. Thus suppose A. devised all his freehold estate called B. to C. for life, and then afterwards gave his above-devised "lands"

to C., this would only give C. a life interest. (See *Doe v. Tucker*, 3 B. & Ad. 473; *Roe d. Boves v. Blackett*, Cowp. 235; *Doe v. Groillim*, 5 B. & Ad. 122; *S. C.* 2 Nev. & Man. 247; *Vick v. Sueter*, 3 El. & Bl. 219; sed vide *Moone v. Heaseman*, Willes, 138.) Where, however, there is a devise of an estate, although by reference to a former description not capable in itself of carrying the fee (*Doe d. Bates v. Clayton*, 8 East, 141; *Doe d. Allport v. Baron*, 4 Mau. & Sel. 366; *Uthwatt v. Bryant*, 6 Taunt. 317), an estate in fee simple will pass. It may, however, be cut down to a more limited estate by the context (*Bruce v. Bainbridges*, 5 J. B. Moore, 1; *S. C.* 2 Brod. & Bing. 123; and see *Spry v. Bromfield*, 7 Mees. & W. 545; 10 Sim. 94), but the intention must be clear. *Doe d. Lady Dacre v. Roper*, 11 East, 518.

The devise of the *rents* of an estate to a person, his heirs and assigns, will pass the fee in the same way as if it had been a devise of the estate. *Stewart v. Garnett*, 3 Sim. 398.

The terms "inheritance" (*Widlake v. Harding*, Hob. 2; *S. C.* nom. *Whitlock v. Harding*, Moore, 873), "real effects" (when it appears from the context to comprehend land) (*Grayson v. Atkinson*, 1 Wils. 333; *Hogan v. Jackson*, Cowp. 299; 3 Bro. P. C. 388, Toml. Ed.; *Lord Torrington v. Bowman*, 22 L. J., Ch., 236), "property" (*Roe d. Shell v. Pattison*, 16 East, 221; *Nicholls v. Butcher*, 18 Ves. 193; *Patton v. Randall*, 1 J. & W. 189; *Doe d. Booley v. Roberts*, 11 Ad. & Ell. 1000; 3 P. & D. 578; *Footner v. Cooper*, 2 Drew. 7), or all "right and title" (*Sharp v. Sharp*, 4 Moore & Payne, 445), or "interest" (*Andrew v. Southouse*, 5 T. R. 292), in freehold lands would give the fee, because they are considered as having a meaning identical with the word "estate."

By a devise simply of "hereditaments" (*Canning v. Canning*, Mos. 240; *Hopewell v. Ackland*, 1 Salk. 239; *Denn d. Moor v. Mellor*, 5 T. R. 558; 6 T. R. 175; 1 Bos. & Pul. 558; 2 Bos. & Pul. 247; *Doe d. Small v. Allen*, 8 T. R. 503; sed vide *Smith v. Tindal*, 11 Mod. 103), tenements (ante, 588), lands (Ib.), manors (*Paice v. Archbishop of Canterbury*, 14 Ves. 364), or perpetual advowson (*Pocock v. Bishop of Lincoln*, 3 Brod. & Bing. 27), an estate for life only would pass.

The fee in reversion or remainder will pass by the words "reversion" (*Bailis v. Gale*, 2 Ves. 48; but see *Peiton v. Banks*, 1 Vern. 65) or "remainder" (*Norton v. Ladd*, 1 Lut. 755), and it seems to be the better opinion that the words "part" or "share" of themselves would carry the fee (*Montgomery v. Montgomery*, 3 J. & L. 47; *Doe d. Atkinson v. Fawcett*, 3 C. B. 274; *Green v. Marsden*, 1 Drew. 646, 653; sed vide *Middleton v. Swain*, Skinn. 339), they will clearly do so if used in conjunction with the

word "estate," as all "my share of B. and my other estates." *Paris v. Miller*, 5 Mau. & Sel. 408; and see and consider *Bebb v. Penoyre*, 11 East, 160.

Again, where the devise is in such terms as show it to be the testator's intention that the devisee should have complete power and control over the property, the fee will pass even in the absence of all words of limitation. Thus a devise of land to A. "to give and sell," or "to give and sell and do therewith at his pleasure" (*Br. Dev. pl. 39; Whiskon v. Cleyton*, 1 Leon. 156; 8 Vin. Abr. 234, pl. 2; *Jennor v. Hardy*, 1 Leon. 283); in fee simple (*Co. Litt. 9b; 8 Vin. Abr. 206, pl. 8*), "to give away at death to whom he pleases" (*Timewell v. Perkins*, 2 Atk. 102), to "be at his discretion" (*Whiskon v. Cleyton*, 1 Leon. 156; 8 Vin. Abr. 235, pl. 7; see also *Goodtitle v. Otnay*, 2 Wils. 6) has been held to give the fee, but a devise of land "to be freely possessed and enjoyed" has been held only to give a life estate. *Goodright d. Drenry v. Barron*, 11 East, 220; and see *Doe d. Ashby v. Baines*, 2 C. M. & R. 23; 5 Tyr. 655; *Bromitt v. Moor*, 9 Hare, 378; *Doe d. Hickman v. Haslewood*, 6 Ad. & Ell. 167.

Copyholds not being within the statute *De donis conditionalibus*, if there be no custom of the manor that they may be entailed, words which would confer an estate tail in freehold lands will confer in them an estate in fee simple conditional, which will become absolute on the birth of issue entitled to inherit under the devise (*Doe d. Blesard v. Simpson*, 3 Scott, N. R. 774; 3 Man. & Gr. 929; *Doe d. Spencer v. Clark*, 5 B. & Ald. 458); the result is the same in the case of an inheritance of a personal character. *Stafford v. Buckley*, 2 Ves. 170.

Where land is given to a person for life with remainder to his heirs or right heirs, he will, according to the rule in *Shelley's Case*, take an estate in fee simple. See *Shelley's Case*, and note, ante, p. 448.

What Words confer an Estate in Fee in Wills coming within the Operation of the Wills Act.

The rule of construction which we have just examined as to what would confer a fee in wills under the old law, was not only much complicated by questions arising out of exceptions from it, but often defeated the intentions of the testator; for, as was well observed by Lord Mansfield, "generally speaking, no common person has the smallest idea of any difference between giving a horse and a quantity of land, and common sense would never teach any man the difference." (*Cowp. 306.*) To prevent, therefore, the litigation arising from a mode of construction which clashes with the vulgar acceptance of terms, it has been enacted by 1 Vict. c. 26, s. 28 (which is not

Next, with regard to those cases, under the old law, where the owner of the inheritance himself took, not by purchase, but by *descent*, considerable difficulty arose in determining from whom, upon his death, the descent was to be traced, whether from him or from some ancestor through whom he obtained the estate.

In the case of *corporeal* hereditaments, it was essential that the owner of the estate, in order that his heirs might be able to take from him by descent, should acquire *actual* seisin thereof, according to the legal maxim "*seisina facit stipitem*;" and this he might do, either by his own actual entry thereon (Watk. Desc. 44), or, in the case of an infant heir, by the entry of his lord or guardian which would be sufficient (Fitzh. Abr. tit. "*Discent*," 12; Bro. Abr. tit. "*Discent*," 19; tit. "*Entre Congeable*," 37; tit. "*Seisin*," 18; 1 Com. Dig. tit. "*Assize*" (B. 4); 3 Co. 42 a; 9 Co. 106 a; Co. Cop. s. 41, p. 95; *Rex v. Sutton*, 5 Nev. & Man. 353; 3 Ad. & Ell. 611; *Long v. Myles*, Fox & Smith, Ir. K. B. Rep. 1); even although the guardian might not have been formally assigned. *Goodtitle d. Newman v. Newman*, 3 Wils. 528; 9 Co. 106 a.

So the entry of one coparcener, joint tenant or tenant in common, under the old law, was a sufficient entry for all. Watk. Desc. 52.

Entry, however, by the owner of the fee, was not necessary where the land was in the possession of a tenant for a term of years, inasmuch as that would be considered as the possession of his landlord (*Brediman's Case*, 6 Co. 56 b, 239 b, n. (2); Watk. Desc. 49); nor where he exercised acts of dominion over the inheritance, as by repairing houses or fences (Watk. Desc. 59; and see 1 Leon. 265), or by the receipt of rents (Co. Litt. 15), as he would then be considered as seised of the estate.

Where the owner of the inheritance had thus obtained actual seisin, the descent was traced from him; if he had not done so, then it was traced from the next preceding ancestor who had obtained seisin; and if none had done so, then from the last purchaser of the estate. See 1 Real Prop. Rep. p. 15.

In the case of *incorporeal* hereditaments, as rents or advowsons, of which actual seisin could not be had, the receipt of the rents, or in the case of an advowson, the presentation to the church (Co. Litt. 15 b; Fitz. N. B. 36, E; Watk. Desc. 60), would be a sufficient constructive seisin to constitute the owner of the stock from which the descent was to be traced. Where, however, the church was appendant to a manor, of which he had actual seisin, that would also give actual seisin of the advowson. Co. Litt. 15 b, n. (1), 29 a, note (4), 49 a; Gilb. Ten. 18; *Chancellor of Cambridge v. Walgrave*, Hob. 126; *Newman v. Holdmyfast*, 1 Stra. 54; *Rex v. Bishop of Llandaff*, 2 Stra. 1011; *Playre v. Crouch*, Moore, 90, pl. 223.

Where a person was entitled to a remainder or reversion in fee, as, for instance, where there was a freehold interest in another person either under some limitation (Watk. Desc. 110; Hayes's Introd. 277) or by operation of law, as where the father of an heir was tenant by the curtesy (Litt. s. 394; Co. Litt. 241 b; Fitz. N. B. 194; D. & E.; 2 Inst. 30, 31; 3 Co. 23 b), or his mother was endowed of a third part of the estate (Bro. Abr. tit. "Discent," 19; Ib. tit. "Tenant per la Curtesie," 10; Co. Litt. 241 b; Gilb. Ten. 27), or where he was entitled to a fee simple which was limited to take effect on the determination of another by way of executory devise; although in such cases during the continuance of the prior interests he could not obtain *actual seisin*, so as to change the mode of descent, he might, nevertheless, exercise such acts of ownership over his estate, as by granting it over for a term of life or in tail (8 Co. 35 b; Co. Litt. 15 a, 191 b), or by making a conveyance to uses, so that the fee was taken back by express limitation or resulting use (*Stringer v. New*, 9 Mod. 363), and thus have constituted himself the stock from which the descent was to be traced, such acts of ownership being equivalent to the actual seisin of an estate which was capable of being reduced into possession. Watk. Descents, 116.

Where, however, no acts were done by the owner of property not capable of actual seisin, equivalent thereto (except in the case of a remainder or reversion), any claimant of the estate must have made himself heir either to the person who last exercised such acts of ownership, or to the last purchaser. Hayes's Introd. 276.

If, however, the owner of a remainder or reversion died without having done any act equivalent to actual seisin, the descent was traced, in case of a remainder from the first purchaser, or in other words, from the person to whom the remainder was limited on its creation, and in the case of a reversion from the maker of the particular estate on which the reversion was expectant, and of whose fee it was the undisposed of residue. Hayes's Introd. 277.

"This law," as observed by the Real Property Commissioners, "produced many anomalous consequences: as it sometimes made it a matter of chance whether a whole sister or a half brother of the person who last died entitled, or whether a father or an uncle, or more remote relation of the person who last actually enjoyed the property, should inherit; and it might happen that one part of a family estate, having been in the occupation of a tenant, should go one way, another part, as to which the possession might have remained vacant during the time of the person last entitled, should go another way." 1 Real Prop. Com. 15.

To obviate the inconveniences occasioned by this state of the law, it was enacted by 3 & 4 Will. 4, c. 106, s. 2, "that in every case descent shall be

traced from the *purchaser*; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require; the person *last entitled to the land* (which term land by the interpretation clause is made applicable to every species of property transmissible to heirs) shall, for the purposes of the act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same."

We must bear in mind that in the interpretation clause of the act (sect. 1) a purchaser is defined to mean "the person who last acquired the land otherwise than by descent, or than by any escheat, partition or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent."

It seems at one time to have been supposed, under the second section, that if a man purchased in fee, and died leaving issue two daughters only, and one of the daughters afterwards died intestate, leaving issue a son, the descent was to be traced from the father as purchaser, and that the share of the deceased daughter would descend to her surviving sister and to her own son in coparcenary; and consequently in the result the surviving sister would take three-fourths and the son one-fourth only of the entirety. It has been decided, however, that in such case the son will take the whole of his mother's share. See *Cooper v. France*, 14 Jur. 214; and a very able article, 10 Jur. 71, by Mr. Joshua Williams; Will. Real Prop. 383, Append. A; Sugd. Real Prop. Stat. 282.

Not only must the descent now be traced from the last *purchaser*, but the number of persons coming within that term has been increased, because, under the old law, where a testator made the same disposition either by will or deed as the law would have done had he died intestate, viz. in favour of his heir, the latter took by *descent*, as being his preferable title, and not by purchase (see 4 Real Prop. Rep. 74, 75; Co. Litt. 22 b; *Counden and Clerk's Case*, Hob. 30; *Pybus v. Mitford*, 1 Ventr. 372), as well when the estate was equitable as when it was legal (Watk. Desc. 171), and in the case of copyholds as well as freeholds (Fearn, 68, C. R.; *Roe d. Noden v. Griffiths*, 4 Burr. 1952; *Thrustout d. Gower v. Cunningham*, 2 Wm. Black. 1046). So, likewise, where a person seised in fee granted away a part of his interest with remainder to his own right heirs, he was held to have continued seised of the reversion as part of his former estate, which remained descendible in the same line as if no conveyance had been made. *Roads v.*

Morpeth, Cro. Eliz. 321; *Moore*, 284, nom. *Fenwick v. Mitforth*; *Bingham's Case*, 2 Co. 91a; *Godolphin v. Abingdon*, 2 Atk. 57; *Wills v. Palmer*, Wm. Black. 687; 5 Burr. 2615; *Cholmondely v. Clinton*, 2 Mer. 173; 2 B. & Ald. 625; 2 J. & W. 1; 4 Bligh, 1; *Locke v. Southwood*, 1 My. & Cr. 411.

The law upon this subject is now materially altered, for by 3 & 4 Will. 4, c. 106, s. 3, it is enacted, "that when any land shall have been devised, by any testator who shall die after the 31st December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and when any land shall have been limited by any assurance executed after the said 31st December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

Moreover it is enacted, "that when any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said 31st December, 1833, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December, 1833, then and in any such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land." Sect. 4. See *Wrightson v. Macaulay*, 14 Mees. & W. 214; *Winter v. Perratt*, 9 C. & F. 606.

Under the old law brothers and sisters claimed by descent immediately through each other, without mention of the father, though living (*Collingwood v. Pace*, 1 Vent. 413; *Bridg. by Bann.* 410). Now "no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent." 3 & 4 Will. 4, c. 106, s. 5.

Again, under the old law it was a maxim always acted upon that "the inheritance might lineally descend but not ascend" (Litt. s. 3), though it might ascend in the collateral line (Co. Litt. 11a); and although it might circuitously descend to the father as the heir of his son's collateral heir, it would escheat before it would go to the father by lineal ascent as the heir of his son (3 Co. 40a). Thus if a man died without issue, leaving no relative except his father, the land would escheat; if he left his father and an uncle (his father's brother) surviving, the uncle would succeed to his property as heir, and if he entered into the land, and died without issue, the father would

then succeed, as collateral heir to his brother and not by lineal *ascent* as heir to his son (Litt. s. 3; see also *Cowper v. Cowper*, 2 P. Wms. 734, 735; *Eastwood v. Vincke*, Ib. 613). The father, however, might take by *purchase* as next of blood of his son; as if a lease were made to the son for life, remainder to his next of blood, the father would take the remainder by purchase. Co. Litt. 10b.

There being no valid reason for the exclusion of lineal ancestors, it has been enacted, "that every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue." Sect. 6.

If, therefore, in a case arising under the new law, a man died leaving brothers and sisters and a father, his father would take as heir before the eldest brother.

It is further enacted, "that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and, also, that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed." Sect. 7.

The next section merely declares that to be law which is laid down by Mr. Justice Blackstone in his Commentaries (see Vol. 2, p. 238; and see *Hawkins v. Shewin*, 1 S. & S. 257; *Davies v. Lowndes*, 7 Scott, 56; 5 Bing. N. C. 169). It enacts and declares, "that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants." Sect. 8.

Under the old law, a brother or sister of the half blood could not take by

descent from a brother or sister by a different father or mother. Thus if a man had issue two sons by different wives, and the elder *purchased* land in fee simple, and died without issue, the uncle or some other collateral relation of the elder brother would take as his heir, because the younger brother was of the half blood (Litt. s. 6); and if the elder brother had a sister of the whole blood, she would have succeeded before the brother of the half blood. Litt. s. 7.

So, likewise, if in the last case the lands had descended from the father to his eldest son, and the eldest son had acquired seisin thereof, or what we have before seen was in some cases equivalent thereto, the eldest son thereby made himself the stock from which the descent was to be traced, and his sister succeeded to him as heir in preference to the brother of the half blood, according to the well-known rule, *possessio fratris de feodo simplici facit sororem esse hæredem*. If, however, the eldest brother had not obtained seisin, or what was considered tantamount thereto, the descent would have been traced from the father, and in that case the brother of the half blood would take in preference to the sister of the whole blood of the deceased brother. Litt. s. 8; Sir W. Jones, 361.

A brother of the half blood might, however, succeed to the property circuitously, though the collateral heir of his brother. Thus if there were two brothers by different marriages, and the elder was seised of land in fee and died without issue, and his uncle entered upon the land as his next heir, and died without issue, the younger brother might take the land as heir of his uncle, inasmuch as he is of the whole blood to him, though he be but of the half blood to his elder brother. Litt. s. 8.

Under the new law, persons of the half blood are rendered capable of inheriting under the 9th section of 3 & 4 Will. 4, c. 106, which enacts "that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor, where such common ancestor shall be a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother." Sect. 9.

Moreover, under the old law, where persons were attainted of high treason or felony, they were not only incapable of inheriting lands, but also, by reason of the corruption of blood, of transmitting them to their posterity; and no person could, at any rate in the case of a fee simple, derive a title through an

attainted person (Co. Litt. 8 a, 391 b ; Yorke's Forfeiture, 72, 4th Ed.). It should be mentioned, however, that in the case of a fee tail, if a son of tenant in tail was attainted, his child might nevertheless, by claiming per formam doni, succeed to his grandfather. *Donties's Case*, 3 Rep. 9 b ; *Mantell v. Mantell*, Cro. Eliz. 28 ; *Sheffield v. Ratcliff*, Godb. 305 ; Hob. 347 ; Br. "Discent," pl. 1 ; Bro. "Forfeiture," pl. 37 ; Yorke's Forfeiture, 81, 82 ; see also *Attorney-General v. Sir George Sands*, and note, post.

The severity of the old law has been mitigated by the late act, which enacts, "that when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st January, 1834." Sect. 10.

The act is not to "extend to any descent which shall take place on the death of any person who shall die before the 1st January, 1834" (s. 11); and "where any assurance executed before the said 1st January, 1834, or the will of any person who shall die before the same 1st January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st January, 1834."

The tables of descent under the old and new law may be consulted in Blackstone's and Stephen's Commentaries.

The canons of descent under the old law, that is to say, with regard to descents which took place on a death before the 1st January, 1834, are thus laid down by Blackstone :—

Rule 1. That inheritances shall lineally descend to the issue of the person who last died *actually seised*, in infinitum ; but shall never lineally ascend.

Rule 2. That the male issue shall be admitted before the female.

Rule 3. That where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.

Rule 4. That the lineal descendants in infinitum of any person deceased shall represent their ancestor ; that is, shall stand in the same place as the person himself would have done had he been living.

Rule 5. That on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules.

Rule 6. That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. That in collateral inheritance the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from a female.

The following canons or rules governing descents under the new law—that is to say, with regard to descents which may take place on or after 1st January, 1884—have been laid down by Serjeant Stephen in his Commentaries, vol. 1, p. 273:—

1. In every case the descent shall be traced from the purchaser.

2. That inheritances shall in the first place lineally descend to the issue of the purchaser in infinitum.

3. That the children of the purchaser are preferred to their own issue; and, among such children, males to females, and an elder male to a younger; but females (where there are several) take together.

4. The issue of the children of the purchaser represent or take the place of their parents in infinitum, the children of the same parent being always subject (among each other) to the same law of inheritance as contained in the third rule.

5. On failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor, then living, in the preferable line; supposing no issue of a nearer deceased ancestor in that line to exist.

6. Among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser, or of any ancestor, male or female) is always preferred to the maternal.

7. Where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule, have descended, dies before the purchaser, leaving issue, the issue of such ancestor in infinitum shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser; but with this addition, that those related by the whole blood to the purchaser are preferred to those related by the half blood.

In case a person die without heirs his lands will *escheat*, or if during his life he commit felony or treason, they are liable to forfeiture. See *Sir George Sand's Case*, and note, post.

Liability of Lands in Fee Simple to Debts, &c.

Lands in fee simple are now liable to a man's debts both by specialty and simple contract (1 Will. 4, c. 47; 3 & 4 Will. 4, c. 184); debts by specialty, however, having priority, except in some cases where the assets are equitable.

As where lands are by the will of the debtor charged with the payment of his debts, in which case debts by specialty and debts by simple contract are payable *pari passu*. See 2 L. Cas. Eq. 80, note to *Silk v. Prime*. As to what amounts to a charge of debts, see *Ib.* 83.

Formerly, an equity of redemption being equitable assets, in the administration thereof in equity, debts by specialty and simple contract were payable *pari passu* (*Solley v. Gower*, 2 Vern. 61; *Plunket v. Penson*, 2 Atk. 290). It has, however, been decided by Lord Cranworth, C. (when Vice-Chancellor), that in the administration of real estate, *not* devised for the payment of debts, an equity of redemption is, by 3 & 4 Will. 4, c. 104, assets in equity for the payment of debts both by specialty and simple contract, the debts by specialty having precedence as in the case of purely legal assets. *Foster v. Handley*, 1 Sim. N. S. 200.

Estates in fee simple are also liable to judgment debts, crown debts and *lis pendens*. *Prideaux on Judgments*; *Williams, Real Prop.* 66—72; *Dart, V. & P.* 252.

II. *Fee Simple determinable.*

Lord Coke, in *Edward Seymour's Case*, divides the fee simple determinable into two classes, the first of which is expressly derived out of an absolute estate in fee; and this he again subdivides into—1. The fee simple conditional, or mortgage. 2. The fee simple limited or qualified. The second of those classes comprehends—3. The estate in fee derived out of an estate tail; or, in other words, a base fee.

1. *Fee Simple conditional or Mortgage.*

Where land is conveyed to a man and his heirs, with a condition that upon payment of a certain sum and interest, on a certain day, he may re-enter, this is a fee simple conditional: if the money be paid at the time agreed upon, the land again becomes the property of the borrower or mortgagor: if it be not paid, at *law* it becomes the absolute property of the lender or mortgagee. Courts of Equity, however, from a very early period, considering that the real object of the conveyance was to secure the payment of principal and interest, relieved against the forfeiture incurred by the strict letter of the conveyance, and allowed the mortgagor to redeem, upon his making an application in a reasonable time, and on the payment of principal, interest and costs. This right to redeem is termed the mortgagor's "equity of redemption," and Courts of Equity will not allow it to be given up, or even (except, perhaps, in the case of family arrangements) confined to a particular time, or class of individuals, by any contract entered into by the

mortgagor at the *time* of the mortgage (2 L. Cas. Eq. 756), although the mortgagee may stipulate for a right of pre-emption in case of a sale. *Ib.* 758.

Upon these conditional conveyances (which are also made for terms of years as well as in fee) is built our modern law of mortgages; and Courts of Law still adhere to their ancient severity, in considering the estate forfeited on nonpayment of the money at the period agreed upon.

The necessity for the intervention of Courts of Equity, except in those cases where the legal rights of the mortgagee do not enter into conflict with the principles of equity, has given to the latter Courts almost the entire administration of the law as to mortgages.

Legal Estate and Rights of the Mortgagee.

The legal estate of the mortgagor may be transferred by him, by act *inter vivos*, or may be devised by his will; otherwise it descends to his heir-at-law according to the usual rules relating to descents.

Estate of the Mortgagor.

An equity of redemption, although at one time looked upon as a mere right, was held by Lord Hardwicke to be an *estate* in the land, and may therefore be devised, entailed or conveyed; and in the event of the owner dying intestate, its descent is governed by the laws applicable to the land itself. *Casborne v. Scarfe*, 1 Atk. 603; 2 L. Cas. Eq. 760; *Fancett v. Lowther*, 2 Ves. 304; see *ante*, p. 594.

2. *Fee Simple limited and qualified derived out of an Estate in Fee.*

A fee simple limited and qualified, derived out of an estate in fee simple, is determinable upon the happening of some event. Thus where there is a limitation to a person and his heirs, so long as another person has heirs of his body (*Plowd.* 557; 10 Co. 97 b; 3 Leon. 117), so long as St. Paul's shall stand (*Plowd.* Com. 349, 557), till the marriage of a certain person shall take place (*Cro. Jac.* 593; 10 Vin. Abr. 233), until a minor shall attain his age of twenty-one years (*Spenser v. Chase*, 10 Vin. Abr. 203; 1 Prest. Est. 433), or, in fact, until any particular act be done (*Ib.* and see *Dy.* 300 b; *Blagrove v. Clem.*, 2 Vern. 523, 578; *Thomasin v. Machworth*, Carter, 75; *Bosworth v. Farrand*, *Ib.* 107), it will confer a fee simple limited or qualified, which has been defined as an estate which *may* in certain events continue for ever (1 Prest. Est. 431; *Plowd.* 557; *Shep. Touch.* 97); for instance, suppose a limitation to be made to a man and his heirs till the marriage of B., or till the return of C. from Rome, and the death

of B. happen before his marriage, or the death of C. takes place before his return from Rome; by these circumstances it becomes impossible that the event expressed for the determination of the estate should ever arise, and the estate will continue for ever in precisely the same manner as if the parties had not annexed to the disposition any collateral limitation, giving to the estate a determinable quality. 1 Prest. Est. 440.

In some cases, however, an estate is given to a man until the happening of an event which must some time or other take place, as till a tree shall fall, or while a tree shall stand; in such cases, the estate will remain determinable (1 Prest. Est. 440), unless the person who has the remainder or reversion expectant on such estate, release his interest to the person having the determinable fee. Ib.

Again, under this head may be classed estates in fee liable to be determined by an executory devise, till they are discharged by the event or by release, from the determinable quality. *Goodright v. Searle*, 2 Wils. 29; 1 Prest. Est. 445.

If the owner of a determinable fee convey that estate to a man and his heirs generally, and without any restriction, the construction of law on this conveyance would be, that the determinable quality annexed to the estate, while in the tenancy of the person by whom it is conveyed, shall follow the same into the hands of the person to whom the transfer is made, according to the maxim "*Nemo potest plus juris in alium transferre quam ipse habet.*" 1 Prest. Est. 435.

These determinable fees are governed by the same rules of descent as the fee simple absolute and indeterminate. Bac. Abr. tit. "Heir," 1 Prest. Est. 445.

3. *Fee Simple limited or qualified derived out of Estate Tail or Base Fee.*

A base fee is where a tenant in tail, with remainder to another, aliens by such an assurance as has only the effect of barring his own issue, so that he confers thereby an estate determinable upon the failure of the issue under the entail. The nature of this estate, and the mode by which it might, under the old law, and at the present day be created, can be more conveniently taken into consideration when we examine into the nature of an estate tail, from which it is derived.

III. *Estate Tail.*

Taltarum's Case is celebrated as the decision which led to the introduction of recoveries, by means of which a tenant in tail whose estate, by the Statute of Westminster 2 (13 Edw. 1, c. 1), was inalienable, might bar an estate tail

and convert it into an estate in fee simple. See *Sir Anthony Mildmay's Case*, 6 Co. 40; *Taylor v. Hord*, 1 Burr. 115; *Martin d. Tregonwell v. Strachan*, Willes, 452.

Before the Statute of Westminster 2 (13 Edw. 1, c. 1), commonly called the statute *De donis conditionalibus*, where an estate was conveyed to a man and the heirs of his body, with a condition annexed to the gift, that if the grantee died without issue, the land should revert to the donor, at common law this was considered a fee simple conditional, and the conveyance to the grantee and the *heirs of his body*, was construed to be equivalent to a fee simple upon which no remainder could be appointed, in the same way as if the gift had been made to A. and his heirs, if he *had heirs of his body*. The birth of the issue was the performance of the condition, which, for the purpose of alienation, made the fee simple, in the hands of the alienee, absolute, by destroying the possibility of reverter. But if, before alienation, the donee had died without issue, the lands reverted to the donor; and the remedy for recovery of the lands upon the reverter, was not by entry of the donor or his heirs, as for a condition broken, but by a *formedon in the reverter*. Hence it appears, that if lands were given to A. and the heirs of his body, with a condition expressed, that if A. died without heirs of his body the lands should revert; upon the birth of issue of A. the condition was performed, and A. had an immediate power of aliening the absolute fee simple; so that for the purpose of facilitating the power of alienation, the birth of the issue was considered as the performance and dispensation of the condition, in a case where the right of entry was in terms expressed to arise on the failure of issue. 1 Sand. Uses, 212.

By the statute *De donis* (13 Edw. 1, c. 1), this interpretation was declared to be contrary to the minds of the givers, and the form expressed in the gifts wherefore it is ordained, that "the will of the giver, according to the form of the deed of gift manifestly expressed, be henceforth observed; so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs, if issue fail, or there is no issue at all. And if a fine levied hereafter upon land so given, it shall be void at law."

This statute thus enabled parties to establish perpetual and inalienable entails, in fact perpetuities.

The introduction and result of this system of inalienable estates, and the mode in which the Judges, by the invention or application of recoveries, as in *Taltarum's Case*, enabled tenants in tail to unfetter their estates, in favour of the free circulation of property, is thus graphically described by Coke:—"All these perpetuities were against the reason and policy of the

common law; for at common law all inheritances were fee simple, as Littleton saith, lib. 1, cap. "Estate Tail;" and the reason thereof was, that neither lords should be defeated of their escheats, wards, &c., nor the farmers or purchasers lose their estates or leases, or be evicted by the heirs of the grantors or lessors; nor such infinite occasions of troubles, contentions and suits arise. But the true policy and rule of the common law in this point was, in effect, overthrown by the statute *De donis conditionalibus*, made anno 13 E. 1, which established a general perpetuity by act of parliament (for all who had hereditaments would make it), by force whereof all the possessions of England in effect were entailed accordingly, which was the occasion and cause of the said and divers other mischiefs. And the same was attempted and endeavoured to be remedied at divers parliaments, and divers bills were exhibited accordingly (which I have seen), but they were always on one pretence or other rejected. But the truth was, that the lords and commons knowing that their estates tail were not to be forfeited for felony or treason, as their estates of inheritance were before the said act (and chiefly in the time of Hen. 3, in the Barons' War), and finding that they were not answerable for the debts or incumbrances of their ancestors, nor did the sales, alienations or leases of their ancestors bind them for the lands which were entailed to their ancestors, they always rejected such bills, and the same continued in the residue of the reign of E. 1, and the reigns of E. 2, E. 3, R. 2, H. 4, H. 5, H. 6, and till about the 12th year of E. 4, when the Judges, on consultation had among themselves, resolved, that an estate tail might be docked and barred by a common recovery, and that by reason of the intended recompence, the common recovery was not within the restraint of the said perpetuity, made by the said act of 13 E. 1." *Sir Anthony Mildmay's Case*, 6 Rep. 40 a, 1st Resolution.

The ground upon which the Judges maintained recoveries was by a fiction, that when the recoveror obtained the estate, the issue in lieu of it obtained compensation in value.

The mode in which the operation was conducted was as follows:--the tenant in tail got a friend to commence a collusive action against him, and then, as defendant, alleged that the title had been *narranted* by a third party, who at his request was called upon to defend the title according to his warranty; this person, who was termed the vouchee, being called upon, admitted the warranty, and allowed judgment to go against him by default, and thereupon judgment was given for the plaintiff, who was termed the demandant, to recover the lands against the tenant in tail, and the tenant in tail had judgment to recover a *recompence of lands of equal value*, which (assuming their existence to be real) would go to the tenant in tail and his issue, in lieu of those recovered by the demandant by the de-

fault of the warrantor, and their right to the latter lands was barred, and not only was the right of the issue, but also that of the reversioner or remainderman ; so that, subsequently, the recoveror might reconvey the lands recovered to the tenant in fee, or as he should direct.

In perusing *Taltarum's Case*, it will be seen, as observed by an able writer, that it was "cunningly managed" (Pigot, *Recov.* 9) ; for, *primâ facie*, it seems to be an adverse judgment, and the opinion of the Court was for the issue in tail, against the recovery ; but from the arguments of the Judges, it appears they were all of opinion, that if the tenant in tail had been actually seised of the estate tail at the time of the recovery, the recompence in value would then have descended in lieu of the estate tail, and therefore the issue in tail would have been barred.

There were, however, many cases, in which recoveries were held good, where the parties barred could have no advantage of the recompence ; it was therefore soon admitted, that the recompence in value was a mere fiction, given merely as a plausible reason for common recoveries when they were first invented, and that their validity depended, not upon the recompence in value, but because they were common assurances. See *Dormer's Case*, 5 Co. Rep. 40 b ; *Martin d. Tregonwell v. Strachan*, Willes, 449.

There was another mode by which estates tail might be barred, viz. by a fine, a species of assurance much more ancient than a recovery (*Cruise, Fines*, c. 1.) Fines like recoveries were fictitious actions ; but in this respect differing from recoveries (which were actions carried completely out to judgment), they were the compromises of actions by the permission of the Court, whereby the right to the land which was the subject-matter of the action, was acknowledged to be the right of some of the parties. 2 Bl. Comm. 348.

They were called fines from the Latin word *finis* or *end*, because they put an *end* to fictitious suits. (2 Bl. Comm. 349, 354 ; Co. Litt. 121 a, n. (1). Fines, however, were by no means so efficacious as recoveries ; for by the latter, a tenant in tail in possession could not only bar his issue, but also the remainderman or reversioner, except in certain cases, where the crown was interested, which have been before mentioned (*ante*, p. 385) ; whereas by the former, only the issue was barred, as in *Seymor's Case*, and a limited estate in fee, or base fee was created, determinable upon the failure of the issue of the person levying the fine. Co. Litt. 121 a, n. (1).

As to the different kinds of fines and their various operations, see *Cruise, Fines*, 5 ; *Cruise, Dig.* tit. 35.

Fines and recoveries are now abolished, and a more simple mode of assurance substituted for them by 3 & 4 Will. 4, c. 74, by deed enrolled in Chancery, as to which see *post*, p. 614.

Different Kinds of Estates Tail.

Tenants in tail are of two kinds;—1. Tenants in tail general; and, 2. tenants in tail special.

1. Tenant in tail *general* is where an estate is limited to a person and the heirs of his or her body, in which case the issue by *any* marriage may by possibility inherit. Litt. s. 14, 15.

2. Tenant in tail *special*, is where an estate is limited to the heirs of the body of two persons, either already married, or capable of intermarriage, as to A. and the heirs of his body begotten upon B., or to B. and the heirs of her body to be begotten by A., or to A. and B. and the heirs of their bodies; in all which cases, no issue, except by the marriage of those two persons, could by possibility inherit. Litt. 16.

Again, estates tail, whether general or special, may be limited to the heirs male or the heirs female, each of which will, in such a case, take to exclusion of the others. Litt. 21—27.

As to tenant in tail after possibility of issue extinct, see ante, p. 36.

What Words create an Estate Tail by Deed.

In deeds technical words are required in order to create an estate tail, in the same mode, as we have seen before, that technical words are required for the creation of an estate in fee simple by deed.

In the first place there must be words of inheritance, as the word “heirs.” “For,” as observed by Coke, “seeing every estate tail was a fee simple at the common law, and at the common law no fee simple could be in feoffments and grants, without the word ‘heirs,’ and that an estate in fee tail is but a cut and restrained fee, it followeth, that in gifts in a man’s lifetime, no estate can be created without the word ‘heirs.’” Co. Litt. 20 a. Thus if a person give lands or tenements to a man and his seed, or the issue or children of his body, he will only take an estate for life, because there are no words of inheritance. Ib. 20 b.

In a special case the word “heir” in the singular number may be sufficient to create an estate tail (39 Ass. p. 20; Co. Litt. 20 a); so a limitation to A., and such heir of her body as shall be living at her death, with remainder over, for want of such issue has been held to confer an estate tail upon A. *Richards v. Lady Bergavenny*, 2 Vern. 324.

A gift, however, may be good without words of inheritance by reference to another limitation where there are words of inheritance. Thus if a man give lands to A. and the heirs of his body, remainder to B. in manner aforesaid, B. will take an estate tail. Co. Litt. 20 b.

The reference to the previous limitation containing words of inheritance

must be clear, and of this Coke gives us an instance; for he says, "If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. in formâ prædictâ, this remainder is void for uncertainty; but if the remainder had been to C. in eâdem formâ, this had been a good estate tail; for idem semper proximo antecedenti refertur." Ib.

There must also be words of procreation as well as words of inheritance, as heirs "*of the body*." The words, however, "*of the body*," are not strictly required, as words amounting to as much will be sufficient, to confer an estate tail (Co. Litt. 20 b). Thus if land be given to B. and the heirs which the same B. shall lawfully beget on his first wife, this will be a good estate in tail special, although B. had no wife at the time of the gift, and without the words "*of the body*" (Co. Litt. 20 b). So, as Coke says, it is, if lands be given to a man, and to his heirs which he shall beget of his wife, or "to a man and the heirs de carne suâ, or to a man and the heirs de se, in all these cases these are good estates tail, although the words "*of the body*" are omitted (Co. Litt. 20 b.) A devise to one et hæredibus legitimè procreatis is an estate tail (H. 43 Eliz., C. B., Rot. 1408; *Moor's Case*, 711), but contra by act executed (*Dormer's Case*, 7 Co. 41 b). If lands be limited by deed to the use of I. S. and hæredum masculorum suorum legitimè procreatorum, remainder over, it is a fee simple; but if it be hæredum masculorum de se, or in English *the heirs of him lawfully begotten*, especially where there is a remainder over, it is an estate tail (*Bedell's Case*, 7 Co. 41; *Dormer's Case*, H. 38 Eliz., B. R., Rot. 739; Hal. MSS. note, 121; Co. Litt. 20 b).

So if a gift be to a person "and his heirs, if he have heirs of his body, and if he dies without heirs of his body to revert to the donor" or to "a man and his heirs, and if he die without issue, to remain to another." Co. Litt. 21 a; 1 P. Wms. 57, n.; Burton, Comp. s. 652.

The rule in *Shelley's Case*, which has been before examined, is applicable to estates tail equally with estates in fee simple. See ante, p. 480.

What Words create an Estate Tail by Will.

The proper technical mode of creating an estate in tail *general* is by a devise to a person "and the heirs of his body."

An estate in tail *special*, if confined to the male line, should be given to him "and the heirs male of his body;" if confined to the female line, to him "and the heirs female of his body."

In wills, however, technical words are not essential, if expressions are made use of which show an intention of the testator, in devising the inheritance, that it should devolve only upon his *lineal* descendants, generally

or specially, and not also upon his relatives in the ascending or collateral lines, according to the ordinary rules of succession. Thus a devise to A. and his heirs lawfully begotten (*Church v. Wyat*, Moore, 637), or "his heirs lawfully begotten" for ever (*Nanfan v. Legh*, 2 Marsh. 107; *S. C.* 7 Taunt. 85; and see *Mortimer v. Hartley*, 6 Exch. 47; 3 De G. & Sm. 316; sed vide *S. C.* 6 C. B. 819). Although no words of procreation be used the same result will follow. Thus a devise to A. and his heirs male (*Baker v. Wall*, 1 Ld. Raym. 185), or right heirs male (*Lord Ossulston's Case*, 3 Salk. 336), for ever (and see *Doe d. Earl of Lindsey v. Colyear* 11 East, 548), or to A. and his heir male living to attain the age of twenty-one (*Doe d. Tremewen v. Permewon*, 3 Per. & D. 303; 11 Ad. & Ell. 431), or his right heirs by B. his wife for ever (*Wright v. Vernon*, 2 Drew. 439), will give A. an estate tail. But a devise to a man and his "lawful heirs" will give him the fee and not an estate tail (*Simpson v. Ashworth*, 6 Beav. 416; *Stratford v. Powell*, 1 Ball. & B. 1; *Matthews v. Gardiner*, 17 Beav. 254. But a devise to a man and the next male (*Burley's Case*, cited 1 Vent. 230; *Miller v. Seagrave*, 16 Vin. Abr. "Parols," H. pl. 4, n.) or first heir male (*Dubber d. Trollope v. Trollope*, Amb. 453), of his body, give an estate tail to the ancestor. See also *Goodright v. Pullyn*, 2 Ld. Raym. 1437; 2 Stra. 729.

Where, however, words of limitation are superadded after the devise to "next heir male" (*Archer's Case*, 1 Co. 66 b), or "heir male" (*Willis v. Hiscox*, 4 My. & Cr. 197), those words will be considered as a designatio personee, and the ancestor will take only an estate for life, and his next heir male will take an estate tail as purchaser. See also *King v. Melling*, 1 Vent. 214.

A devise to a man and his seed will give him an estate tail. Co. Litt. 9 b.

Although there may be a devise to a person and "his heirs," such a meaning may be affixed to the term, by subsequent expressions, as to show that it means heirs of the body; in which case, the devisee will take not an estate in fee but an estate tail. As, for instance, if there be a devise to A. and his heirs, but if he die without issue (*Browne v. Jerveis*, Cro. Jac. 290; *Chadock v. Comley*, Ib. 699), A. will take an estate tail. Upon the same principle, where there is a devise to a person, and his heirs, with a limitation over if he die without heirs, to another who is or may be his heir, the first limitation will be construed as an estate tail, "the generality of the word heirs" being, as Lord Talbot says, "restrained to heirs of the body; since the testator could not but know, that the devisee could not die without an heir while the remainderman, or any of his issue, continued." (*Tyte v. Willis*, Ca. t. Talb. 1, see ante, p. 364.) But where the second limitation is to a stranger, it is void as too remote, and the first limitation according to

its legal import confers the fee. *Tyte v. Willis*, Ca. t. Talb. 1; *Grumble v. Jones*, 2 Eq.-Ca. Abr. 300, pl. 15; 11 Mod. 207; Willes, 166, n.; *S. C. nom. Aumble v. Jones*, 1 Salk. 238; *Griffiths v. Grieve*, 1 J. & W. 31; and see ante, p. 363.

A limitation over, however, to the right heirs of a person to whom an estate tail is previously given, will not convert such estate tail into a fee, it will be a remainder dependent upon it. *Brice v. Smith*, Willes, 1.

Upon the same principle as we have before seen a fee simple may, by subsequent explanatory words, be reduced to an estate tail, so an estate in tail general may, by subsequent words, be converted into an estate in tail special. *Fitzgerald v. Leslie*, 3 Bro. P. C. 154, Toml. Ed.

See *Shelley's Case*, ante, p. 448; *Gardner v. Sheldon*, ante, p. 505; *Wild's Case*, ante, p. 542; and *Forth v. Chapman*, ante, p. 552; and the notes thereto, in which will be found many instances of estates tail being conferred by will.

Incidents to Estates Tail.

Among the incidents to estates tail may be mentioned that of the tenant being at liberty to commit waste, as by cutting down timber for whatever purpose planted, or pulling down houses on his estate. *Attorney-General v. Duke of Marlborough*, 3 Madd. 532; *Saville's Case*, cited Ca. t. Talb. 16; and see Mos. 224.

An estate tail is also subject to curtesy and dower. See ante, pp. 38, 42.

Tenant in tail is entitled to the deeds and muniments belonging to his estate, and the Court of Chancery will order them to be given up to him *Papillon v. Voice*, 2 P. Wms. 471.

A tenant in tail cannot be compelled by the remainderman or reversioner to keep down the interest of incumbrances, because they are considered as wholly in his power (*Amesbury v. Brown*, 1 Ves. 477; *Chaplin v. Chaplin*, 3 P. Wms. 235); though if he pay the interest, his personal representatives on his death will not be creditors for the amount of interest paid, and the remainderman or reversioner will have the benefit (1 Ves. 481). The guardians, however, of an infant tenant in tail are bound to apply the rents and profits in keeping down the interest due on mortgages, and, if they allow it to run into arrear, an account of the rents and profits will be decreed against them after the infant's death. *Sergison v. Sealey*, 2 Atk. 416; *Burges v. Mawbey*, 1 T. & R. 167, 176.

The issue of a tenant in tail, is bound neither at law nor at equity by any contracts or agreements of his ancestor (*Jenkins v. Keymes*, 1 Lev. 237;

Herbert v. Fream, 2 Eq. Ca. Abr. 28; *Weale v. Lower*, cited 2 Vern. 306; 1 P. Wms. 720; *Wharton v. Wharton*, 2 Vern. 3; *Hill v. Carr*, 1 Ch. Cas. 294), unless he confirms them. *Ross v. Ross*, 1 Ch. Cas. 171.

Nor will an estate tail be liable to any of the tenant's debts (1 Cruise, tit. 2, s. 33), except judgment debts, when he might have barred the estate without the assent of any other person (1 & 2 Vict. c. 110, ss. 13—18), and crown debts (33 Hen. 8, c. 39, s. 75; *Anderson's Case*, 7 Co. 21; *Foskew's Case*, 2 Leon. 90; *Coxhead's Case*, 1 Cruise, Dig. tit. 2, s. 38.)

At common law a tenant in tail could not grant a lease by an ordinary assurance; much inconvenience, however, having been found to result in consequence of leases being granted by persons, who concealed from their lessees the fact that they were tenants in tail (for although the heir in tail might have received large assets from the ancestor, he could not have been compelled to confirm the lease), the statute 32 Hen. 8, c. 28, was passed, by which tenants in tail are enabled, by deed, to make leases for their lives or twenty-one years binding upon their issue (1 Cruise, tit. 2, s. 39); but not upon the reversioner or remainderman. *Windam's Case*, 8 Co. 34 a; Noy, 6; *Keen v. Cope*, Cro. Eliz. 602; see 1 Platt, Leases, 65—93.

And now a tenant in tail is enabled without enrolment, to grant a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five sixth parts of a rack rent. 3 & 4 Will. 4, c. 74, ss. 15, 40, 41.

On the bankruptcy of a tenant in tail, his estate may be barred and disposed of for the benefit of his creditors, to the same extent as he might have done so for his own. 3 & 4 Will. 4, c. 74, ss. 55—58.

Mode in which Estates Tail may be now conveyed.

After the 31st December, 1833, no fines can be levied or recoveries suffered, except in certain cases where proceedings had been commenced for such purposes (3 & 4 Will. 4, c. 74, ss. 2, 3), and the mode substituted for barring estates tail, and all estates and interests to take effect after the determination or in defeasance of estates tail, is an assurance by deed (s. 40), to be enrolled in the Court of Chancery within six calendar months after the execution (ss. 41, 73), and by such deed he may either convey away the fee simple absolute, or any less estate (ss. 15, 21), or otherwise modify and dispose of the estate, in the same manner as if he were seised in fee (s. 40), unless such tenant in tail were a woman seised ex provisione viri, under 11 Hen. 7, c.

20, by a settlement made before the act (ss. 16, 17), and except as to reversions in the crown under 34 & 35 Hen. 8, c. 20. Sect. 18; see ante, p. 385.

Under the old law, a tenant in tail expectant upon an estate of freehold, could only have barred his *own issue* by a fine, unless he obtained the concurrence of the tenant of the immediate freehold in suffering a recovery, as otherwise there would be no tenant to the præcipe, a personage whose presence was absolutely essential to the suffering of an effective recovery. The tenant to the præcipe having been abolished, a new functionary was substituted in his place, by whom the power of a tenant in tail in remainder expectant, upon an estate of freehold, is still controlled.

This is effected by means of the protector to the settlement, who may briefly be described as the owner of the first existing estate under a settlement, prior to the estate tail under the same settlement (s. 22), or any person appointed to that office by the settlor (s. 32), whose consent is requisite in order to enable the tenant in tail to dispose of the lands to the full extent to which he is enabled under the act, but without such consent he cannot create a larger estate than a base fee. Sect. 34.

There are many clauses in the act as to what persons, in certain cases, are to be protectors (ss. 22—32); and provisions are made for cases where the protector is either lunatic, idiot, or of unsound mind, or convicted of treason or felony, or an infant (ss. 33, 48, 49). The protector is to be subject to no control in the exercise of his power of consenting (s. 36); and the rules of equity, in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, are not to be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of a protector giving his consent to a disposition by a tenant in tail under the act (s. 37); and the consent of the protector may be given by the same assurance or a distinct deed (s. 42). If by a distinct deed, it must be enrolled at or before the assurance (s. 46), and he cannot revoke his consent (s. 44). A married woman who is protector may consent as a feme sole. Sect. 45.

To prevent much of the litigation, which would certainly otherwise have arisen, Courts of Equity are excluded from giving any effect to dispositions of tenants in tail or consents of protectors of settlements, which in Courts of Law would not be effectual. Sect. 47.

Where an estate tail is in possession, that is where there is no previous life estate, and there is no protector, the tenant in tail, himself alone, may, by deed duly enrolled, bar the entail and any remainders and reversions.

Where there is a protector, either in the person of the owner of a previous

life interest, or appointed under the provisions of the act, and his consent cannot be obtained by the tenant in tail, the latter can only acquire a base fee,—that is to say, a fee simple which will endure as long as his own issue; and upon their failure, the persons entitled in remainder or reversion may enter upon the estate. But by obtaining the consent of the protector, the owner of a base fee may acquire the fee. Sect. 35.

A mere devise of or contract to sell entailed lands will be void, not only as against the persons in remainder and reversion, but also against the issue of the tenant in tail. Sect. 40.

As to the confirmation of voidable estates, see s. 38.

It may here be mentioned, that, under the old law, a tenant in tail having the immediate remainder or reversion in fee in himself, by levying a fine, conferred a title founded upon the remainder or reversion, and consequently burdened with all incumbrances affecting the remainder or reversion. In order to exclude the remainder or reversion, a recovery was necessary (1 Hayes's Introd. 187). The act now has this operation. See section 39, whereby it is enacted, that "If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be ipso facto enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person. Ib. 39.

The act also contains provisions as to copyholds (ss. 50—54, 76), bankrupt tenants in tail (55—69, 72), and entailed money (70—72).

ATTORNEY-GENERAL v. SIR GEORGE SANDS (a).

Mich. and Hil. Terms, 20, Easter Term, 21 Car. 2, in Scaccario.

[REPORTED HARDRES, 488.]

ESCHEAT—FORFEITURE.]—*A. purchased land for ninety-nine years in his own name, and afterwards purchased the inheritance, and had the same conveyed to B., his son-in-law, in fee as trustee, and by his will disposed of the same to the sons of B., his grandchildren, born or who should be born in his lifetime, in fee, and directed conveyances to be made accordingly by his trustee and executor. At the death of A., B. had two sons, C. and D. C. afterwards died, and E. (a son of B. born after the death of A.) killed his brother C., for which he was attainted and executed; and no conveyances pursuant to the will of A. were made by B., who, having taken out administration on the refusal of the executor to act, had become possessed of the term as administrator as well as seised of the fee as trustee of A.'s will:—Held, that the trust of the inheritance was not forfeitable at common law, because, if it were, the lord must be in by escheat, which could only be for want of a tenant, and here the trustee was tenant, and was consequently entitled to the lands discharged of the trust. Secus had it been a case of treason, as it would have come within the statutes 26 Hen. 8, c. 10, and 33 Hen. 8, c. 20.*

Held, also, that the term was not forfeited; for, if it was considered as a chattel severed from the inheritance, it was not vested in the person attainted, but was the property of B., as administrator of A.

If the term was considered as attendant on the inheritance it was not

forfeitable, inasmuch as the person entitled to the inheritance, viz. B., could claim the benefit of it.

If an alien purchase lands in the names of trustees, the trust is forfeitable to the king, who will be entitled to the profits, although the land itself may not be forfeited to him.

Lands of inheritance in the hands of trustees in trust for a person owing debts to the crown are liable to such debts per cursum Scaccarii.

If the grantee of a rent in fee simple die without heirs the tenant of the land shall hold it discharged of the rent, because there is no other that has any title to it.

UPON an information exhibited here, and proceedings upon it, a case was made and stated, which was to this effect: viz.—

Sir Ralph Freeman purchased land for the term of ninety-nine years, in his own name, and afterwards purchased the inheritance of the same lands [in the name of Sir George Sands his son-in-law] in trust [for himself and his heirs]: and then by his will disposed of these lands to the sons of Sir George Sands, his grandchildren born, or which should be born in his lifetime [in fee], and directed conveyances to be made accordingly by his trustee, and [Mr. Freeman, whom he made his executor,] and died.

At that time Sir George Sands had two sons, Freeman and George, and Freeman died; and after the death of Sir Ralph, Sir George had another son Freeman, who killed his brother George, for which he was attainted and executed, and no conveyances were made by the trustees pursuant to Sir Ralph Freeman's will. [Sir George Freeman took out administration to his son George.] And the questions hereupon were two: First, whether, as this case is, the term for years was forfeited? Secondly, whether or not the inheritance in trust was forfeited?

Mr. *Winnington*, for the plaintiff.—A trust is defined in 1 Co. 121 (b), to be an interest annexed in privity to an estate in lands, and the common law takes notice of it: Litt. s. 464. Cestuy que trust shall be impanelled on a jury: vide Co. Litt. 272 b; 5 Ed. 4, 7. There

(b) *Chudleigh's Case*, ante, p. 200.

shall be a *possessio fratris* of a trust, and it was transferable before 27 Hen. 8, c. 10, and the second feoffee should be seised to the former use: vide 3 Co. 2, 3. It will pass by grant. And there is a diversity betwixt a privity in estate and a personal privity; the latter will not go to the king, but the former will. For authority, vide 12 Co. 1, 2; a case cited collaterally, which is contrary to Cro. Jac. 512, 514, where it is held, that a trust of a term is forfeitable, but not a trust of an inheritance: 1 Anders. p. 294. A use not forfeited for felony, unless it be of a chattel. The term in this case of ours is forfeited; for this is not a term that attends the inheritance, but it is a substantive estate of itself, not attending upon or ancillary to the inheritance, for they are severally directed by the party, and Sir Ralph had the term a long time before he purchased the inheritance. Vide 1 Edw. 4, 6; 5 Co. 56.

Ellis, for the defendant.—First [point], the trust of an inheritance is not forfeited for felony. First, because to a forfeiture for felony and to an escheat, a tenure is requisite: vide 3 Inst. 21. And for that reason a fair or a market are not forfeited, and a trust is not held of any, but the lands in trust. Secondly, if the law were otherwise there would be a double forfeiture of the same thing, viz. by the trustee, and by the cestuy que trust, which is unreasonable and cannot be: vide 14 Hen. 8, 8. Thirdly, cestuy que trust has neither *jus ad rem*, nor in re, but a remedy in equity only: 11 Hen. 4, 5; 5 Ed. 4, 7; 3 Co. 2, 3: which does not extend to a parol trust of lands, tenements and hereditaments: vide *The King v. Holland*, Alleyne, 14; 21 Car. B. R.: a trust for an alien in fee not forfeited to the king (2 Cro. 513), nor for felony; but it is grantable over by common use in equity.

Second point. If a trust of a term attend the inheritance then it is of the same nature with the inheritance; but if it do not attend the inheritance, but be a substantive estate of itself, it is not forfeited, because it belongs not then to the felon, nor was ever in him, but it goes to the administrator of the termor, which the defendant in this case is; and the felon had no interest in this term by the devise, because he was not then born.

Hale, C. B.—The sole question is here, whether the lease attend the inheritance in such manner, as that the inheritance cannot be forfeited without it; for if it do not so attend it, then does it not appertain to the felon, but to the administrator of him that was slain, or to the trustee in possession; and then this point as to the term will be out of doors. But if it do attend the inheritance, the question will be, to what purpose it does attend it: for to some purpose it does not, as to prevent dower, or to stave off a debt; for such a term shall be assets, if it attend an inheritance in fee simple, but not if it attend an estate tail, which is not subject to the payment of debts in equity.

Maynard, Serjeant, for the plaintiff(c).—The inheritance and the lease were not forfeited. There are two reasons why estates are forfeited for felony; one for example, the other for the increase of the king's revenue, in order to the public safety. And I conceive, that although the lease do not wait upon the inheritance, yet it is forfeited in this case, because the defendant Sir George Sands, who hath the lease as administrator, has it distinct from the inheritance that was conveyed to him before, and the lease being in him in autre droit it does not drown in the inheritance; for if it did, it would not be assets, but might work a devastavit, which the law will not work by any operation, for it will not work a wrong; so that the term is not extinguished. And it is agreed on both sides, that both the lease and the inheritance were in the defendant in trust for his son George.

Then, secondly, by George's death, they are in the defendant in trust for his son Freeman, the felon; and notwithstanding the meeting of these two trusts of a term and of the inheritance, the one does not drown the other.

Then, thirdly, a lease for years in trust is forfeitable for felony, for the king's interest and by his prerogative; and so it was held, Pasch. 7 Jac., in *Sir Walter Raleigh's Case*, in Scacc., that a trust of a term is forfeited; and so it was ruled, Trin. 11 Jac., in *Abington's Case*. But the case of an inheritance in trust is not resolved. And in 2 Car. 512, it is held, that a term in trust is forfeited, and not a fee in trust. Hil. 3 Car. 1, Scacc. *Babington's Case*, held, that if the king's receiver purchase a lease in trust, it is liable to the king's debts, though it were

(c) Hil. Term, 20 Car. 2.

afterwards aliened. And in Pasch. 12 Car., C. B., in *Sir Anthony Anger's Case*, it is held, that a lease for years of an advowson in trust is forfeited by the outlawry of cestuy que trust; but it is held there, likewise, that the king cannot have a quare impedit or an ejectment, but a subpoena only.

And great regard ought to be had to the king's revenues in this case, because of the consequence of it. And a trust does not hinder a man from granting over the term, as is seen in daily practice. If one obligee commit felony, the whole obligation is forfeited. And it was resolved in Hil. 30 Eliz., B. R., that matter of account is forfeitable to the king by outlawry, though not transferable by grant, as a trust of a term is.

And if it be so, that the trust of a term is forfeitable, then the question will arise betwixt the felon and the king, whether of the two shall be preferred. And it is clear that the felon cannot have a trust against the king, and the trustee can have no colour to withhold it from both the felon and the king, and the king may pardon and restore it to the felon, by which means the trustee would lose the benefit of it. And certainly, in all reason, the king ought to be preferred before the felon, for otherwise the punishment of felony and the interest of the king's revenue would be both avoided.

Also, a trust is a right in conscience to take the profits, and ensues the nature of the land; for by the 5 Ed. 4, there shall be a possessio fratris of a use. And by Co. Litt. cestuy que use may take a release as tenant at will; and trusts are looked upon by acts of parliament as lands, vide the Statute of Mortmain, Frauds, &c. Nay, they were looked upon as creeping up to the distinction of the common law, and therefore the Statutes of Bankrupts enable the commissioners to dispose of them. And although a trust in fee be not forfeited to the king by way of escheat, as is held, 2 Cro. 513, the reason of that is because the king has a tenant in by title; and if it were otherwise, in that case, the lord would be prejudiced; but there can be in this case no prejudice to any third person, for the lands here are held of the king. In 31 Ed. 1, Rot. 30, in Scacc. in the Treasurer's Remembrance, if a baron purchase lands in fee jointly with his feme, yet they shall be liable to the king's debt, after the husband's death, if his wife survive him. And it was held in 22 Jac. in Cur. Wardor.,

that a power of revocation in the party is subject to the king's debt. And since we are here in a court of conscience, it is not conscionable for Sir George Sands to keep it to himself, and less conscionable for him to withhold the fee simple from the king. And no assent of the administrator to hold the term in trust for the felon will debar the king of it; because it is assets to debts, vide 40 Ass. 35, that the assent of an executor is not necessary, in case of a legacy given to the king.

Sir Robert Atkins, for the defendant, argued that neither the trust of the inheritance nor of the lease was forfeited.

First, a trust is altogether the same that a use was before 27 Hen. 8, and they have the same parents—fraud and fear,—and the same nurse—a court of conscience. By statute law a use, trust or confidence, are all one and the same thing. What a use is, vide Plowd. Com. 352; and *Chudleigh's Case* (1 Co. 119b, ante, p. 200), and they are collateral to the land. A cestuy que trust neither has jus ad rem, nor in re. Now for the first point, a trust in fee simple is not forfeited for these reasons: First, it is not an interest at common law, and therefore not forfeitable. And it was one of the chief causes why uses were invented; viz., to prevent forfeitures, as appears in *Seignior Sheffield's Case*, Hob. 334. And in this respect they do not differ from commons or rents, which are not forfeitable. And *Chudleigh's Case* (1 Co. 119b), they are neither chattels nor inheritances, but amphibious sorts of things, and of unnatural generation, and the common law has no regard to them. Vide Doct. & Stud. 98; Lane's Rep. 104; Perk. 69, 89. No dower, nor tenancy by the curtesy of a use. An action of trespass lies against a cestuy que use, Plowd. Com. 3; Dyer, 340; 12 Co. 2; not forfeitable for treason, Bulst. 2, part 337; nor do acts of parliament take notice of them, so as to countenance them, but to suppress them, 1 Inst. 71; and to support the rules of law, Dyer, 10; Plowd. Com. 58; Dyer, 134, 163, they are barred by fines, run along with the land, and there shall be a possessio fratris of them, 1 Co. 136b. They were not at the common law, but were lately found out, vide Hobart's Rep. 338.

First objection.—Uses are countenanced by the law; for cestuy que use shall be impanelled on a jury.

Resp.—The reason of that depends upon the statute of 2 Hen. 5, c. 3. A trust does not lie in tenure, and therefore is not forfeitable.

3 Inst. 21, 25 Ed. 3, of Treasons, does not extend to uses, 3 Inst. 19; and it would be unreasonable to subject the same lands to double forfeitures, viz. by the owner of the land, and by the cestuy que trust. Vide Lane's Rep. 42.

Besides, a man's interest in a use is in the nature of a right of action which is not transferable, 10 Co. 48, 52; 3 Co. 2, 3. No remedy for it but in equity; and if the case in 10 Co. had not been settled, it would be hard to maintain it for law; and so it has been held by good opinions. And the lord by escheat, is to hold the lands discharged of the trust; and by the same reason shall not have the forfeiture of it. Vide Mo. Rep. 196; Princip. Pasch. 8 Jac. For authorities, vide 3 Co. 2, 3; 2 Cro. 512, 513; 5 Ed. 4; 7 Bro. "Feoffment al Uses." A feoffee shall hold lands discharged of them; and the lord of a villein was not to have them till 19 Hen. 8, c. 15, 1 Inst. 19, 33 Hen. 8, and other acts which give the forfeiture of uses in particular cases, show that they were not forfeitable before.

Second point.—The trust of a term which waits upon the inheritance is not forfeitable either, and this point has two parts;—First, whether the trust of a term waiting can be forfeited. Secondly, whether this term here do so wait as not to be forfeited, but to stick to and follow the inheritance. In this case, the term for years was originally taken in Alderman Freeman's name, and the inheritance afterwards purchased in the defendant's name; and then both are given by will to the defendant's sons, whereby George the son had the possession of the term by the devise, and the inheritance waits upon it; and the devise here is, only a declaration, that the devisees should have the lands by conveyance from the trustees, and not before; so that, before such conveyance, they have but as it were a right of action, and but an equitable right, and it is not properly a trust of a term, but a declaration to whom the conveyance shall be made; and therefore the estate continues in the offender, and it is not for a Court of Equity to dislodge it, and make it wait upon the inheritance, although the devisor might intend it. For that is but a puisne practice, and it tends to the subversion of the rules of law to turn a term for years into an inheritance, though neither an estate in dower nor a tenancy by the curtesy can be had out of it. And such settlements of terms have always been discountenanced by the Judges. 1 Cro. 2, 30; Mo.

Rep. 810; 10 Co. 52; and 15 Jac. 1, Exchequer Chamber, held that *Lampet's Case* deserved to be questioned, if it were not settled.

Second point.—A trust for years is not forfeited. First, because the cestuy que trust has no legal interest. Secondly, he had no legal remedy to gain possession. Thirdly, the lord by escheat would hold the lands discharged of it, and therefore in this case the trustee for years shall have the advantage of it. And 2 Cro. 512, does not warrant the contrary in case of a forfeiture for felony; for there was not in that case any lease from the king, but a personal contract which is not devisable, as the interest of the term was here. And the Lord Coke, in his 3 Rep. takes a difference betwixt choses in action or personal, and frauds apparent; where there is a fraud apparent there will be a forfeiture, but there is none in this case. There was no fraud in the creation of this lease, the intention of separating it was to be a security to the inheritance. And *Armstrong's Case*, there cited, is not like to this case; for, in the case of a bond, the party has a legal interest to forfeit, and fraud intended upon the statute of 3 Hen. 7, c. 4, is the ground of the forfeiture of the lease. But no such fraud appears here; vide Lane's Rep. 104; 42 Mich. 7 Jac. lib. Decretor. in Scaccario, 146; and *Sir Walter Raleigh's Case*, there fraud was the reason and ground of the judgment. If a lease be assigned in trust, and then the inheritance be purchased, and the purchaser be attainted of treason, the king shall hold the estate discharged of the lease, because here is fraud and covin. And in *Chudleigh's Case*, 1 Co. 119b, a trust in fee simple is to many purposes regarded as a chattel, so that this being here the trust but of a chattel, will not enforce the forfeiture, vide Dyer, 143. And if the lease in our case wait upon the inheritance, then it is for the defendant; and it will wait upon him as well as upon the offender, if he have the inheritance. And judgments in equity ought not to contradict the rules of law, or delight to make forfeitures, Lane's Rep. 54. A trust of a term which a husband has in right of his wife is not forfeited for the felony of the husband, which does not contradict *Abington's Case*, for there was a fraud; and so there was in *Chirton's Case*, Dyer, 160 a: and so he concluded pro defendente.

Hale, C. B.—There is no question concerning the forfeiture of the fee simple in trust; for that must arise by escheat, and *there can be no*

escheat but pro defectu tenentis, but here is a tenant in esse. If the offence committed had been treason, then there might have been a question whether the inheritance in this case should be forfeited, in regard the rent and tenure have a continuance. But whether Sir George Sands shall hold the land discharged of the lease, or that the king shall have the term, is the sole doubt. The king does not gain an interest in a trust by forfeiture, as he does in debt; for there the interest of the bond passes to the king and process lies to recover it in the king's own name.

And it is questionable whether the king can have this in point of prerogative in case of felony, though, perhaps, more might be said if the offence had been treason.

It is the intention of the party that creates and governs uses and trusts. And, therefore, a lease shall be deemed to attend the inheritance, if it appears that the parties intended that it should do so; as here it does. And then it is no more than a shadow,—an accessory to it, for otherwise it would not be attendant of it. And then it cannot in this case go to the felon; but to the administrator of George the son. And here they are consolidated by the intention of the will, which directs that the trustees shall make conveyances accordingly; nor is it kept on foot, but only to avoid mesne incumbrances, which might effect the inheritance. And this appears to have been the intention of the parties when the use was purchased, and therefore the lease ought to go with the fee. And in the cases of leases for years in trust that have been forfeited, fraud was the ground of it in the cases that have been cited. Et adjournatur.

Afterwards, in Easter Term, Anno 21 Car. 2, the barons delivered their opinions.

Turner, B., pro defendente.—That here is no forfeiture, neither of inheritance nor of the term. That the inheritance in trust was not forfeited, he quoted *The Marquis of Winchester's Case*, 3 Co. 1, 2, 5; Cro. Jac. 504; Ed. 4, 7. And the statute of 33 Hen. 8, c. 20, concerning forfeitures for treason, admits it.

Secondly. That the lease was not forfeited, he argued from its being attendant upon the inheritance, and quoted Co. Plea. Cor. 19.

Hale, C. B.—There are two main points in the case. First, whether the inheritance be forfeited? Secondly, whether the term for years be? And I hold that neither is forfeited.

First. The trust of the inheritance is not forfeitable in this case, because if it were the king must be in by escheat; which cannot be but for want of a tenant, and here the feoffee is tenant. And at this day a trust in fee or in tail is not forfeited at common law, but by the statutes of 26 Hen. 8, c. 10, and 33 Hen. 8, c. 20, for treason, as appears by the words of the acts. And herewith agrees *The Marquis of Winchester's Case*, 3 Co. 1.

Secondly. I hold that such a trust in an alien is forfeitable and will belong to the king; as it was held in Tr. 23 Car. in *Holland's Case*: and the reason is because an alien has no capacity to purchase, for the benefit of any other, but of the king. And it would otherwise be inconvenient that aliens should receive the profits of lands to their own use; and the mischief would be the same, as if aliens purchased the lands themselves; but, in that case, the king is entitled to the profits only, the land itself is not forfeited to him.

Thirdly. I agree that in case of the king's debtor, lands in trust for him in fee simple are liable to the king's debt by the common law, per cursum Scaccarii, which makes the law in such cases; and this appears by precedents, temp. Hen. 6; and before 4 Hen. 7 a trust or use was liable to a statute, and that is the reason of *Chirton's Case*, in 50 Ass. (Dyer, 160a). And it was held in *Sir Ed. Cook's Case*, in Cur. Wardor., that if the king's debtor have a power of revocation, that makes them liable to the king's debt. And that was the reason of *Babington's Case*, in Cur. Wardor. in 30 Car., and of *Hoad's Case*, in Pasch. 4 Jac., where lands in trust for a recusant were subjected to the debt of 20l. per mensem. So in 41 Eliz., *Babington's Case*, a trust liable to a debt imprest because cestuy que trust has a profit by it; but that is a special case, and grounded upon a special course in the Exchequer. But the forfeiture of an inheritance for felony depends upon another reason, viz. *upon the want of a tenant*, which does not hold in this case. And in the statute of Hen. 8, of Uses, this reason of law appears, as also in the statute of 17 Hen. 7, of a purchase by a villain in trust, because the lord has a tenant to answer him his services.

Object. If this trust be not forfeited to the king, who shall have it?

Resp. The feoffee, Sir George Sands, shall now hold the lands discharged of it, as in the case of a grantee of a rent in fee simple, who dies without heirs, the tenant of the land shall hold it discharged of the rent, because there is no other that has any title to it; and so he concluded that point.

The second matter is, whether the term for years be here forfeited? And I deny that it is. There is a diversity betwixt a term assigned and a term originally created. If a term be assigned in trust with fraud, it is forfeited by the outlawry of cestuy que trust, because it is only a chattel and so esteemed, wherewith agrees Cro. Jac. 513, and *Babington's Case*, before cited, and *Sir Walter Raleigh's Case*; and such a trust shall go with the inheritance and is governed by it, as in *Lord Molineux's Case*, where it was held, that it should go to the heirs of a man's body; and so in some cases a term for years shall go along with an inheritance (*d*). As if a feme covert has a trust for years, her husband cannot dispose of it, as he may of a term not in trust. Vide Co. Litt. chap. "Remitter." And in many cases trusts are ruled by other rules of equity than lands are, as in case of a trust in fee, a Court of Equity does not make it assets to an heir, as it does a trust for years in the hands of an executor; so that the course of equity governs them. A trust for years cannot be limited in tail with remainders over, no more than a term for years can. A trust of a term that follows the inheritance may be resembled to a box of charters, which shall go to the heir with the land that they concern (4 H. 7, 10); but if the owner grant them over, then they shall go to the executors of the grantee; for by the grant they become severed from the inheritance, and become chattels in gross: 8 Ed. 4, 3. So here, if the lease had been assigned over and severed, it would have been forfeited; but so long as it is attendant upon the fee, it is not forfeitable. Nor was there any conveyance or appointment in this case to make it a lease in gross. And therefore it cannot be forfeited, for these reasons:—

First. Because the estate in law of the term was not in the person attainted, but in the lessee; and if it were liable to be forfeited, it must

(*d*) 1 Inst. 351 a.

be forfeited as being a chattel in him, it is not forfeited by him. And this term could not by any means come to the person attainted, for he was not the person for whom it was designed, but to his brother George, and then it must go as a chattel to his executor or administrator, who is Sir George the defendant. And if it were not a chattel in George, it cannot be so in Freeman, but must attend upon the inheritance ; so, quacunqve viâ datâ, the term here is not forfeited.

Secondly. My second reason is grounded upon the intention of the director and devisor that it should attend the inheritance ; and be conveyed over accordingly, that it might not be kept asunder. And the devisor directed, that both estates should be conveyed to Freeman and George Sands, deceased. But George had a power to dispose thereof, which he has not done. But if it had been limited to the first, second and third sons of George in tail, then George would not have had a power to dispose of it, because then it would have depended upon the freehold. But as this case was, George might by his act have disposed thereof as heir, the lease being an attendant upon the inheritance, but it would not be forfeited, *causa qua supra*.

Thirdly. The person attainted is not the first person to whom it was limited ; but he came to it as heir, and by consequence takes it as part of the inheritance, and he has no other interest in it. As where a mortgage for years is assigned over in trust to attend upon the inheritance purchased by the mortgagee. And if it were otherwise, many inconveniences would ensue in cases of marriage settlements, and other settlements of estates, in which it is the common course to preserve such a term, and not to let it drown in the inheritance. For if the term were but forfeited in such a case, it would frustrate the whole design of the settlement. *Sir Walter Raleigh's Case*, in the Exchequer, was to this effect, viz. Queen Elizabeth purchased a lease for years, and gave it to Sir Walter Raleigh, and afterwards she purchased the fee, and intended to give it to Sir Walter likewise, who, to prevent a merger, assigned over the term to his son, then a child of six years of age. Afterwards the Queen conveyed the fee to Sir Walter, who settled it upon his son ; but the conveyance was void at law. Afterwards, in primo Jac., Sir Walter was attainted of treason, and then granted over all his goods and chattels in trust for himself,

and then made a lease of his lands for ninety-nine years, if he should so long live, in trust for himself. And it was adjudged, that the lease supra was forfeited, though assigned to his son, because there was fraud apparent, and himself took the profits and had surrendered and taken a new lease of the bishop of whom it was held; and that the king's inheritance was discharged of it, or at least that it should be attendant on the inheritance that was forfeited. So he concluded pro defendente; and judgment was afterwards given, quod defendens eat inde sine die.

"The case of Sir George Sands," says Sir Thomas Clarke, M. R., in a celebrated case, "was depending a great many years—argued by very great men (Pasch. 17 Car. 2, and Mich. 20 Car. 2), which adds weight to the authority, and in 21 Car. 2, Hale and Trevor gave their opinions . . . Hale in his Pleas of the Crown (vol. 1, p. 249), says it was unâ voce resolved, so no doubt but all the judges of the Court concurred." *Burgess v. Wheate*, 1 Eden, 200.

In the principal case Lord Chief Baron Hale clearly shows upon what ground the right to escheat, one of the few remaining incidents of feudal tenure, is founded; viz., *on the want of a tenant to perform services*. "Some books may use the expression 'for want of heirs,' but its promiscuous use is owing to this, that before the power of alienation, want of tenant and heir was the same thing, for at the death of the ancestor none but the heir could be tenant." 1 Eden's Rep. 201.

This should be borne in mind, as it frequently leads to a confusion of escheat with forfeiture, the distinction between which is laid down by Lord Hale in the principal case, and which it is proposed to follow up in this note.

With regard to tenures it should be remembered, that by 12 Car. 2, c. 24, tenure by knight service with its oppressive feudal burdens was abolished, and converted into free and common socage. Customary tenures, such as by copy of court roll, burgage and gavelkind, frankalmoigne, and tenures by grand serjeanty and petit serjeanty, which were held by merely honorary services, were retained by the statute. With the exception, however, of rents certain, heriots, suits of court and other services incident to common socage and fealty, fines for alienation due by the customs of particular manors, and certain reliefs due in respect of quit rents on the death of tenant in common socage, the harsher features of tenure were abolished (Harg. note to Co.

Litt. 85 a (1)), and subsequent legislation has done much to remedy the inconvenience of remaining tenures. The consequence is that though escheat, once one of the most striking, and also one of the most profitable fruits of tenure still remains, like others, it is shorn of much of its former importance.

All lands are the subject of tenure, and are held either immediately from the crown or from some mesne lord; and if, in consequence of the neglect to preserve the badges of tenure, it be no longer known of whom the lands are immediately holden, then the crown can claim them upon an escheat; for to the crown fealty belongs, and from the crown they are certainly holden by presumption of law, and without necessity of proof. 3 Cruise, Dig. tit. 30, pl. 21; Booth's Real Property Act, 135; *May v. Street*, Cro. Eliz. 120.

Escheats are of two kinds; the first, propter defectum tenentis, or as it is sometimes termed, propter defectum sanguinis; the second, propter delictum tenentis.

1. *Escheat propter defectum tenentis.*

When it takes place.

Where a person dies intestate without leaving any person who according to our law of inheritance (as to which, see ante, p. 594) can claim as heir, any estate of which he is seised in fee will escheat to the lord from whom the fee is held, the lord taking as ultimus hæres. 2 Black. Com. 245; Co. Litt. 18 b.

A bastard, being in contemplation of law filius nullius, has no inheritable blood, consequently if there appear no person to claim an estate but a bastard it will escheat. 1 Steph. Comm. 418.

Where, however, a man, having a bastard son, marries the mother, and has legitimate issue by her, if the father dies, and his bastard son, who is termed *bastard eigné*, enters into possession and dies seised, whereby the land descends to his issue, the eldest legitimate son, who is termed *mulier puisné*, and all other heirs, are barred (Litt. s. 399). The result is the same if two daughters (the elder being a bastard) enter upon lands as coparceners. Co. Litt. 244 a.

As a bastard can have no heirs, except lineal heirs or those of his own body, if a bastard die intestate without lawful issue, any estate of which he may be seised in fee will escheat (Co. Litt. 244 a); but he may, during his lifetime, alien or by his will devise such estate.

Again, if there be no other inheritable issue than one of monstrous birth, not having human shape, the land to which such person would have been entitled will escheat to the lord, though mere deformity of body, if there be

human shape, will not prevent the issue from inheriting (Co. Litt. 7 b, 29 b). The law is thus expressed by an old writer, " Qui contra formam humani generis converso more procreantur, veluti si mulier monstrosum vel prodigiosum sit enixa, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et si membra sint inutilia aut tortuosa, non tamen est partus monstrosus." Bract. l. 1, c. 6, s. 7, and l. 5, tr. 5, c. 30, s. 10.

If a tenant in fee simple, being entitled to the benefit of an attendant term of years, dies without heir, and the land escheat, the trustee of the term cannot hold the lands as against the lord during the continuance of the term, but a subpoena will lie in the Court of Chancery to give the lord the benefit of the term. *Thrupton v. Attorney-General*, 1 Vern. 340; 3 Sugd. V. & P. 92, 10th Ed.; Sanders on Uses, 302, 5th Ed. Attendant terms, however, are now abolished, 8 & 9 Vict. c. 112.

What is liable to Escheat.

As a general rule all lands held in socage, whether of the king or a subject, are liable to escheat, but it must be of the entire fee; therefore an estate tail does not escheat, but goes to the person in reversion, unless the tenant in tail has also the reversion in fee in him, for in that case the whole estate will escheat. Fitzh. N. B. 144; 3 Cruise, Dig. tit. 30, pl. 21. Copyholds are also subject to escheat. Co. Cop. s. 28.

In one case, however, lands in fee simple are not liable to escheat. For if land be given to a body politic or incorporate, as, for instance, to a dean and chapter, or to a mayor and commonalty, and to their successors, upon its dissolution, the land will revert to the donor and not to the lord by escheat. "The reason and cause for this diversity," says Coke, "is for that in the case of a body politic or incorporate, the fee simple is vested in their politic or incorporate capacity created by the policy of man, and therefore the law doth annex the condition in law to every such gift and grant, that if such body politic or incorporate be dissolved the donor or grantor shall re-enter, for that the cause of the gift or grant faileth; but no such condition is annexed to the estate in fee simple vested in any man in his natural capacity, but in case where the donor or feoffee reserveth to him a tenure, and then the law doth imply a condition in law by way of escheat." Co. Litt. 13 b.

As merely equitable estates are not the subjects of tenure they are not liable to escheat. Thus as a cestui que trust is not a tenant, on his death without heirs, the land will not escheat to the lord, because, as was held in the principal case, he can only claim for defect of a tenant, and the trustee

remains tenant notwithstanding the death of the cestui que trust; the trustee therefore is entitled to hold the estate until some one with a better title can claim it. See also the Leading case of *Burgess v. Wheate*, 1 Ed. 177, in which the whole subject is discussed with great research and learning.

In a recent case a testator possessed of part of a share in the New River Company, by his will, executed so as to pass real estate, gave all his property to A. in trust for purposes and legacies the testator should make in any codicil. The testator by a codicil, not attested so as to affect real estates, gave several pecuniary legacies, and died without otherwise disposing of his property, and leaving no heir. It was held by Sir J. L. Knight Bruce, V.C., that the New River shares were real estate for all purposes, and that A. took the shares, and not the crown by escheat. "If the testator," said his Honor, "had left an heir, he would have been entitled beneficially. I do not think that *Burgess v. Wheate* and the present case are substantially distinguishable, and I must decide accordingly." *Davall v. The New River Company*, 3 De G. & Sm. 394.

Upon the same principle, where land is devised to trustees upon trust to convert into money for purposes, which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession, nor has the crown any right to come into equity to ask that the land should be converted, in order that it may take the money as bona vacantia, nor even if the land has been unnecessarily converted, can the crown make good any claim, as the money will be the absolute property of the trustees. *Taylor v. Haygarth*, 14 Sim. 8; *Walker v. Denne*, 2 Ves. jun. 185; *Cradock v. Owen*, 2 Sm. & Giff. 241.

Things which do not lie in tenure, as a rentcharge will not escheat (Bro. "Eschete," 9, 22; Fitzh. N. B. 143 m). So it is laid down in the principal case, that where the grantee of a rent in fee simple dies without heirs the tenant of the land shall hold it discharged of the rent, because there is no other that has title to it. See also Bro. "Extinguishment," pl. 2; *Dean of Windsor v. Webb*, Godb. 211; 3 Inst. 21.

Upon the same ground, in the case of *Henchman v. The Attorney-General* (3 My. & K. 485), where copyhold land was devised to a person in fee, upon condition that within one month he should pay 2,000*l.* to the testator's executor, to be applied after payment of debts and legacies, to charitable purposes. The testator died without leaving any customary heir or next of kin. It was held by Lord Chancellor Brougham (overruling the decision of Sir John Leach, V. C.), that the proportion of the 2,000*l.*, the gift of which was void, under 19 Geo. 2, c. 36, was to be considered as real estate undisposed of, and that the devisee and not the crown was entitled to it. "It does not appear to be material," said his Lordship, "whether the

sum is considered as excepted out of the devise, or as a charge upon it; and for this reason: in the latter case, the devisee takes the whole at once, subject only to a charge which has no effect; in the former view there is a resulting trust for the heir; but the heir cannot be found, or rather there is none, and such trust cannot escheat to the lord of the manor. Indeed, as long as there is a tenant to perform the services, the lord never can take by escheat, and it would be absurd and contrary to all principle, and inconsistent with the very nature of property, to hold that, while the devisee was in as tenant of the copyhold in general, a portion of it, or a sum charged on it, was in the possession, or rather in the holding, of no one, and so escheated *pro defectu hæredis*. As, therefore, the lord cannot take; as beyond all question the crown cannot take; and as there is here no heir of the testator, the devisee alone can take. He takes from necessity, indeed, and because there is none other to take, the resulting trust failing for want of a *cestui que trust*."

If a man having contracted for the purchase of an estate, and after having paid the purchase-money, dies without heirs, the lord claiming by escheat cannot compel a conveyance, but it seems the money having been paid prematurely it would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser, which would leave things in *statu quo*. 1 Eden, 211.

If a mortgagor die intestate and without heirs, the land will not escheat, but the mortgagee will hold the land absolutely, subject, however, to the debts of the mortgagor (*Beale v. Symonds*, 16 Beav. 406), and if the mortgagee demanded payment of the mortgage-money from the personal representatives of the intestate, the lord would not be allowed, on payment of the money, to claim the estate by escheat, but a conveyance would be directed to the personal representative. "If," says Sir T. Clarke, M. R., "the mortgagee took his remedy against the personal representatives, I think the Court would compel the mortgagee to reconvey, not to the lord by escheat, but to the personal representative; and, if necessary, would consider the estate reconveyed, as coming in lieu of the personalty, and as assets to answer even simple contract creditors." 1 Eden, 211.

Where, however, the mortgage is for a term of years, and the mortgagor dies without heirs, the lord will be entitled to the fee simple by escheat; subject, however, to the mortgage, and he will be entitled in equity to redeem the term. *Viscount Downe v. Morris*, 3 Hare, 394; *Rogers v. Maule*, 1 Y. & Coll. C. C. 4.

So where there is merely an equitable mortgage, as by mere deposit of title-deeds, upon the death of the mortgagor without heirs, the land will

escheat, subject to the mortgage, unless the legal estate be vested in a trustee; and where the escheat is to the crown, the mortgagee may sell the estate as against the crown. *Prescott v. Tyler*, 1 Jur. 470.

Formerly, if a trustee or mortgagee in fee of real property died intestate, and without heirs, the estate would have escheated. *Lewin's Trusts*, 218-222; *Coote's Mortg.* 24.

This gave rise occasionally to much injustice, which was partially cured by 39 & 40 Geo. 3, c. 88, s. 12, which gave the crown power, in the case of the escheat of trust property, to make grants of it to trustees for the purpose of executing the trusts. And now, by 13 & 14 Vict. c. 60 (which repeals, and in effect re-enacts, 4 & 5 Will. 4, c. 23), it is provided, that where any person seised of any lands upon any trust, or by way of mortgage, dies without an heir, the Court of Chancery may make a vesting order, which will be as effectual as a conveyance by such heir. Sects. 15, 19.

Under the Escheat Act, 4 Will. 4, c. 23, s. 4 (repealed, and in effect re-enacted by 13 & 14 Vict. c. 60), trust monies might be followed into land against the lords of the fee; and if it were otherwise, the estate in the hands of the lord by escheat is liable to the debts of the person whose estate has escheated. *Hughes v. Wells*, 9 Hare, 749, 774.

Whenever lands escheat, they become the property of the person from whom they were held, who is entitled to all the deeds relating thereto (Bro. Abr. tit. "Charter," pl. 59), and may distrain for rent due to the last tenant, because it is incident to the reversion (Co. Litt. 215 b); but the lord is liable to all the incumbrances of the last tenant (3 Cruise, Dig. tit. 30, pl. 36); and in case the tenant were a man, and died leaving a widow, the land will be liable to her dower; in case the tenant were a woman, the land would be liable to her husband's claims as tenant by the curtesy. *Ib.*; and see ante, p. 51.

So where a copyhold estate escheats to the lord of the manor, he will hold it, subject to any lease made by the copyholder, with the licence of the lord, and also to the freebench of the widow. *Ib.* pl. 37; and see *Turner v. Hodges*, Hut. 102.

Real estate of a person dying without heirs, though he has not by his will charged them with payment of his debts, is, since 3 & 4 Will. 4, c. 104, assets for their payment as against the lord claiming by escheat. *Evans v. Brown*, 5 Beav. 114.

It seems, however, to be doubtful whether such real estate is liable to the debts in priority to, or *pari passu* with, lands specifically bequeathed. *Ib.* See the remarks of Wigram, V. C., 3 Hare, 398.

Some act of the lord is necessary to perfect his title, and the actual pos-

session of the land cannot be gained till he enters or brings his writ of escheat. 3 Cruise, Dig. tit. 30, pl. 9.

In the case of copyholds before the lord enters on the lands escheated to him, the homage ought to present the death of the tenant without heirs; and proclamation ought to be made, to give notice that, if any person comes in and justly claims as heir to the last tenant, he shall be admitted. 3 Cruise, Dig. tit. 30, pl. 22; Co. Cop. s. 28; 2 Ves. jun. 187.

Escheat will be prevented by the alienation of the tenant (3 Cruise, Dig. tit. 30, pl. 17) or by a devise, although it only takes effect at the moment of the testator's death (1 Roll. Rep. 214; Co. Litt. 236 a, n.; *Reeve v. Attorney-General*, 2 Atk. 223); but not by a mere contract to sell (1 Eden's Rep. 211; *Stephens v. Baily*, Nels. Ch. Rep. 107), nor by a void devise. Vaugh. Rep. 270.

However, voidable deeds have been held good against the lord claiming by escheat; as, for instance, a feoffment made by an infant in person. 2 Roll. Rep. 403; 7 Co. 7 b; 1 Eden, 209; *Whittingham's Case*, 8 Co. 42 b.

Aliens.

An alien cannot purchase or hold lands, even through the medium of a trust, and if he attempt to do so they will be forfeited to the crown (*The King v. Holland*, Sty. 21; *Collingwood v. Pace*, O. Bridg. 431); hence an alien cannot take lands by inheritance (Co. Litt. 2 b, 8 a); if, therefore, a person die intestate, leaving no other relations than aliens, his land will escheat to the lord (1 Steph. Com. 420). A person, however, born out of her Majesty's dominions, *of a mother being a natural-born subject*, may now inherit land or take it by devise or purchase, 7 & 8 Vict. c. 66, s. 3. Formerly descent could not be traced through an alien (see Co. Litt. 8 a), though now with some exceptions it may be done (11 & 12 Will. 3, c. 6; 25 Geo. 2, c. 39; and see Co. Litt. by Harg. 8 a, n. 2). When an alien has been made a denizen he may himself purchase lands, and any son born after denization may inherit them, though a son born before denization cannot do so, though he would do so in the case of lands purchased before his father had been naturalized by act of parliament (Co. Litt. 8 a). The terms, however, of letters of denization may enable an alien to hold previously-acquired lands (*Fourdrin v. Gowdey*, 3 My. & K. 383). An alien may now be naturalized for most purposes by the certificate of a secretary of state. 7 & 8 Vict. c. 66, s. 6; *Rittson v. Stordy*, W. R. 1854-55, 627.

Aliens may claim the proceeds of lands directed to be sold. Thus in *Doe d. Hourmelin v. Sheldon* (4 My. & Cr. 525), where a testatrix devised a real estate to trustees, upon trust to sell, and to divide the produce amongst

certain persons, some of whom were aliens, and the estate was sold under the decree of the Court; it was held by Lord Chancellor Cottenham, affirming the decision of Lord Langdale, M. R. (1 Beav. 79), that the crown was not entitled to those shares of the produce of the sale which were payable to the aliens. "The incapacity," said his Lordship, "of aliens to hold land is founded upon political and feudal reasons, which do not apply to money. The testator has given to his legatees no option; but if he had, or if the law would have given it, there can be no reason for the legatee forfeiting money which he may enjoy, because he *might* have elected, instead of such money, to take land, which he cannot."

Where, however, there is no trust for absolute conversion, and the heir is an alien, the crown will be entitled to the estate. See *Fourdrin v. Gowdey*, 3 My. & K. 383.

Bona Vacantia.

The crown, by virtue of its prerogative, is entitled to the chattels real or personal of an intestate, leaving no next of kin, even if such chattels be vested in trustees or executors. *Jones v. Goodchild*, 3 P. Wms. 33; *Middleton v. Spicer*, 1 Bro. C. C. 201; *Rutherford v. Maule*, 4 Hagg. 213; *Dyke v. Walford*, 5 Moore, P. C. C. 434; *Taylor v. Haygarth*, 14 Sim. 8; *Elcock v. Mapp*, 3 H. L. Cas. 492; *Russell v. Clowes*, 2 Coll. 648; *Cradock v. Owen*, 2 Sm. & Giff. 241.

It may be here mentioned that the Courts lean strongly towards applications for further investigation in cases in which property falls to the crown, as that generally happens not from want of next of kin but from failure of legal evidence of their title. *Robson v. Attorney-General*, 10 C. & F. 471; *S. C. nom. Monkton v. Attorney-General*, 2 Russ. & My. 147.

II. *Escheat propter delictum tenentis, and herein of Forfeiture.*

Where a person had been convicted of treason or felony his blood was considered as attainted or corrupted, and it ceased to be the channel through which any inheritance could be claimed.

If a person commit treason the lands are forfeited at once to the crown, in the case of other felonies they go to the crown for a year, day and waste (a privilege respecting which the crown now generally enters into some composition), and afterwards escheat to the lord (see 17 Edw. 2, st. 1, c. 16; 2 Inst. 37; 3 Inst. 47; *Simons v. Blake*, 4 Dowl. 263; *Bullock v. Dodds*, 2 B. & Ald. 258; *Doe v. Pritchard*, 5 B. & Ad. 765; *Rex v. Bridger*, 1 Mees. & W. 145). Where, however, the lands are held directly from the crown, without the interposition of any mesne lord, the crown will take at

once by escheat (1 Steph. Comm. 423). The crown, however, by forfeiture, can only claim those estates of which the person was seised at the time of the commission of the crime (Co. Litt. 13 a); but the blood of the person attainted formerly ceased to have inheritable qualities, and any estates which might subsequently descend to him would escheat to the lord. Thus if a man committed treason, and afterwards an estate descended upon him from his father, it would escheat to the lord. Co. Litt. 13 a.

A pardon from the crown, or the remission of any forfeiture to which the crown is entitled, will not effect the right of the lord to escheat (1 Steph. Comm. 425). As a general rule the pardon did not remove the corruption of blood of any descendants of the person attainted who were born at the time of the attainder, though it would have that effect as to those born afterwards. Thus if a person convicted of felony had a son born at the time of the attainder, although the father obtained a pardon from the crown, the blood of the son still remained corrupted and he could not inherit land through his father, suppose, for instance, from his grandfather, and if the father had issue after the pardon nothing could descend to the youngest, because the eldest was living and disabled, the land would therefore have escheated to the lord; but if the eldest son had died in the life of the father, without issue, then the youngest son would have inherited. So likewise, if the father at the time of his attainder had no children, and after receiving pardon had a son born, then, in the words of Lord Coke, "as he becomes by the pardon a new creature," the son is inheritable. Co. Lit. 392 a; Ib. 8 a.

The only way, therefore, in which corruption of blood could formerly have been completely removed was by act of parliament, a mode in former times by no means unfrequently resorted to. Co. Litt. 8 a.

Where new felonies were created by act of parliament, it was often provided that they should not extend to corruption of blood; and in such cases, although the crown was entitled to the profits of the lands for a year and day, and so long after as the felon lived, his lands would not escheat to the lord. 3 Inst. 47; 1 Steph. Com. 425.

The legislature, however, has in more recent times greatly modified the severity of the common law. Thus, by 54 Geo. 3, c. 145, it is provided, that no attainder for felony, *except for treason or murder*, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender, during his natural life only; and that it shall be lawful to every person to whom the right or interest of any lands, tenements or hereditaments, after the death of such offender, should or might have appertained if no such attainder had been, to enter into the same. And now descent may be traced through a person who has been attainted. 3 & 4 Will. 4, c. 106, s. 10, ante, p. 602.

All lands and tenements in fee simple held in socage, whether of the

crown or of a subject, are liable to escheat propter delictum tenentis (3 Cruise, Dig. tit. 30, pl. 21); an estate tail will not escheat, but will go to the person in reversion, unless the tenant in tail has also the reversion in fee in him; for in that case the whole estate will escheat. *Ib.*; and see *Fitz. N. B.* 144.

Lands in gavelkind do not escheat upon conviction and execution for felony; but the heir, notwithstanding the offence of his ancestor, may enter and enjoy the lands. This has given rise to the couplet—

The father to the bough,
And the son to the plough.

But if tenant in gavelkind, being indicted for felony, absent himself, and is outlawed after proclamation made for him in the country, his heir shall reap no benefit by the custom, but the lands shall escheat to the lord, and the crown shall have a year, day and waste in them, if holden of another, in like manner as the common law directs as to lands which are not subject to the custom of gavelkind. *Rob. Gavelkind*, 288—290, *Wils. Ed.*

Where a person is attainted for treason, his gavelkind lands will be forfeited to the crown. *Ib.* 293.

Copyholds are liable to escheat to the lord for the felony of the tenant (2 *Scriv. Cop.* 631); the crown being first entitled to land for a year and day (*Ib.* 632); but in the case of high treason, copyhold lands will be forfeited to the crown (*Ib.*), unless it be committed by the heir in the lifetime of his ancestor, in which case the lands go to the lord by escheat, and not to the crown by forfeiture, as the son was never seised. *Ib.*; and see *Br. "Eschete,"* pl. 6; *Co. Litt.* 13a.

At common law, an equitable or trust estate would not escheat, either for treason or felony, of the person beneficially entitled, and the person entitled to the legal interest, might retain the estate to his own use. 5 *Edw. 4*, pl. 18, fo. 7b; *Br. "Feoff. al Use,"* pl. 34.

The statute law, however, has now rendered lands vested in trustees liable to forfeiture to the crown for the treason of the person beneficially entitled (26 *Hen. 8*, c. 10; 33 *Hen. 8*, c. 20; and see *Marquis of Winchester's Case*, 3 *Co. 1*); and in the case of a forfeiture for the treason of the owner of land subject to a mortgage, the crown (*Attorney-General v. Crofts*, 4 *Bro. P. C.* 136; *Pawlett v. Attorney-General*, *Hard.* 465), or its assignee (1 *Eden*, 210; *Sir Salathiel Lovell's Case*, *Salk.* 85; *Hodge v. Attorney-General*, 3 *Y. & Coll. Exch. Ca.* 342), may redeem.

Where, however, as in the principal case, the lands are vested in trustees, and the equitable owner commits felony, as the common law in this respect remains unaltered, the equitable estate will not be liable to forfeiture or escheat, as the trustees are tenants; and it is only propter delictum tenentis

in such case that forfeiture or escheat can take place. The trustees, therefore, will hold the lands discharged of the trust (2 Harg. Juris. Exerc. 386). Lands of inheritance of which a man is seised jure uxoris are only forfeitable during the coverture. 3 Inst. 19; 1 Hal. P. C. 251.

Formerly, when a trustee (Lewin's Trusts, 219) or mortgagee committed treason or felony, the estate would have been liable to forfeiture or escheat (1 Hayes's Introd. 322). The inconvenience of this state of the law has since been obviated; for by 13 & 14 Vict. c. 60 (repealing 4 & 5 Will. 4, c. 23, and substituting similar provisions), it is enacted, that "no lands, stock or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place" (s. 46; see *Ex parte Tyson*, 1 Jur. 472); and it is also enacted, that nothing contained in the act shall prevent any escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee; but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if the act had not passed. Sect. 47.

It may be here remarked, that as the intervention of trusts has deprived the lord of escheats on account of the cestui que trust where lands are vested in trustees, it is scarcely just that the fruit of escheats, which took place by reason of the crime or failure of heirs of the trustees, should have been taken from the lord without some compensation being awarded to him. Upon this subject it has been well observed by an eminent writer, that "if the lord can with propriety be deprived of his interest in an escheat, he can be equally so of his interest in the rents and services. To compensate the lord, as nearly as might be, by giving him the escheat of the *equitable* interest on the failure of heirs of the cestui que trust, although objectionable on, among other grounds, that of its creating another anomaly in the law, would be unobjectionable on any moral ground." 1 Hayes's Introd. 388, n.

Whether there be a forfeiture to the crown or escheat to the lord, they will, as a general rule, take the estate subject to all the engagements and incumbrances of the owner affecting it (1 Eden, 192, 203) as an equitable mortgage (*Hodge v. Attorney-General*, 3 Y. & Coll. Exch. Ca. 342); but a Court of Equity will not direct a sale as against the crown having the legal estate (*Ib.*). Where, however, a sale has taken place under an extent, in priority to the crown, the debt due to the mortgagee by deposit will be

ordered to be paid in priority to the claim of the crown. *Casbord v. Attorney-General*, 6 Price, 411, 478.

The wife of a person attainted for treason loses her dower (5 & 6 Edw. 6, c. 12, s. 13), though that is not the case of a tenant by the curtesy in case his wife be attainted for treason after issue born (Co. Litt. 351 a). Secus if the issue be born before attainder (1 Hale's P. C. 359). In the case of other felonies, the lord claiming by escheat was liable to dower as well as curtesy. See ante, p. 51.

Personal estate, except perhaps merely contingent interests (*Stokes v. Holden*, 1 Keen, 145), will be forfeited to the crown, if the owner be convicted for treason or felony, even if it be vested in trustees, as the latter will not be allowed, as in the case of an estate in fee simple, when the cestui que trust had been attainted for felony, to hold for their own benefit (*Wilkes's Case*, Lane, 54; *King v. Dacombe*, Cro. Jac. 512; *Pawlett v. Attorney-General*, Hard. 467; *Sir J. Dache's Case*, cited Aleyn, 16; and see *Lewin's Trusts*, 560; *Hill's Trustees*, 258). And where a felon is undergoing punishment, as by transportation, any personal property accruing to him during that period will be forfeited to the crown. *Bullock v. Dodds*, 2 B. & Ald. 258; *Roberts v. Walker*, 1 My. & K. 752.

Assignment by Felon before Conviction.

Although the crown has a right to an inventory of the goods of a person accused of felony, this is merely a precautionary step, inasmuch as forfeiture does not take place until conviction, and has no relation back to the time of the commission of the offence (see Statute De Cattallis Felonum). Hence, previous to conviction for felony, a person may sell chattels real and personal for the sustenance of himself or family (8 Co. 171; 3 Bac. Abr. 272), or alien bonâ fide for valuable consideration. Thus where a person who was in prison on a charge of felony assigned stock to secure payment of an antecedent debt, and costs to be incurred in his defence, it was held by Sir J. Wigram, V. C., that the assignment was valid as against the crown, notwithstanding his subsequent conviction. *Perkins v. Bradley*, 1 Hare, 219, 229.

The same law seems also to be applicable to the mesne profits of lands of inheritance before the attainder of the person sued. Co. Litt. 390 b.

A colourable alienation, however, of chattels by a person under a charge of felony for the purpose of avoiding a forfeiture, would be fraudulent, and void against the crown. Per Wigram, V. C., 1 Hare, 227; and see *Jones v. Ashurst*, 13 Vin. Abr. 451, tit. "Forfeiture" (P), pl. 6; *Shaw v. Bran*, 1 Stark. 319, 320.

With regard to lands of inheritance, it seems to be the better opinion, that as the attainder has relation to the time of the offence committed, any intermediate conveyance or incumbrance will be void (1 Hale, P. C. 360, 426; 2 Ib. 179; Co. Litt. 13 a, b; sed vide 3 Prest. Abs. 392); and it clearly will be so if made for the purpose of eluding the forfeiture. *Pauncefoot's Case*, cited Lane, 44, 45; 3 Co. 82 a.

Practice of the Crown relating to Escheats and Forfeitures.

In the case of personalty it seems that the crown may take advantage of a forfeiture without office found (4 Steph. Com. 66); but in the case of real estate office must be first found by a jury upon an inquisition or inquest of office duly issued (Ib. 64—66); and in a proper case an order will be made upon petition for leave to traverse an inquisition of escheat found in favour of the crown. *Ex parte Webster*, 6 Ves. 809.

It is the ordinary rule for the crown to give some benefit to the party discovering an escheat, as a lease (*Moggridge v. Thackwell*, 7 Ves. 71), and in the case of *Mason v. Attorney-General of Jamaica*, 4 Moore, P. C. C. 228, what are termed letters of preference appear to have been granted.

Upon a memorial being presented, the crown will often make a grant of escheated property to persons having moral claims upon the intestate; as, for instance, illegitimate children to whom the property has been given by an invalid will (*Cumming v. Forrester*, 2 J. & W. 334); and formerly, when property escheated upon the death of a bare trustee, the crown, upon a memorial being presented, would make a grant to the person beneficially entitled. *In re Sadler*, 1 Madd. 581.

After a person has joined in a petition to the crown, representing an estate to have escheated, and procured a grant to be made of it to himself and others, it seems that he will not be allowed afterwards to set up a claim to a part under a prior title in himself, while taking the benefit of the grant as to the rest. *Cumming v. Forrester*, 2 J. & W. 334.

VINER v. FRANCIS (a).

[REPORTED 2 COX, 190.]

GIFTS TO CHILDREN AS A CLASS.]—*A gift by will to the children of a deceased sister is a gift to those who were living at the death of the testator.*

JOHN WIGGINGTON by will gave to his brother Samuel Wiggington 6,000*l.*, in trust *for the use and benefit of his children*, to be equally divided between them, either in his lifetime or at his death, when and in such manner as he should judge most convenient and beneficial to them. He gave to his sister Martha Selby 3,000*l.*, the interest of which he gave to her for her own use during her life, and at her death he desired the principal might devolve to her son Miles Selby, unless she should have more children, and then the same sum to be shared equally between them. He then added, “*Item*, I give unto the *children of my late sister Mary Crowser*, the sum of 2,000*l.*, to be equally divided among them.” Note—“To the above three legacies I desire 100*l.* may be paid to each within one month after my decease, to buy mourning, &c.” And after giving several other legacies, he gave the residue, after payment of debts and legacies, thus: “I give unto my brother Samuel Wiggington one-third of the residue, and one-third more to my sister Martha Selby, and the other third I give to the children of my late sister Mary Crowser, equally to be divided between the children of my brother Samuel Wiggington, my sister Martha Selby, and the children of my late sister Mary Crowser.

At the *date* of the will there were three children of Mary Crowser living, viz. John, Elizabeth and William. William died *after the date of the will*, in the *lifetime* of the testator; and it was contended that one-third of one-third of the 2,000*l.* given to the children of Mary Crowser lapsed into residue, and that one-third of the residue lapsed, and was payable to the next of kin, as undisposed of.

Sir R. P. Arden, M.R.—There is no doubt in this case on the bequest to the children of Samuel Wiggington, for all his children were living at the death of the testator. It was once, indeed, thought that a bequest to “the children of A.” might extend to *all* children born at any future time; but *Devisme v. Mello* (b) has settled that such children shall take as are born at the time the distribution of the fund is to take place. The doubt in this case arises on the clause which gives “to the children of my late sister Mary Crowser the sum of 2,000*l.* to be equally divided.” As I said before, the general rule as settled by *Devisme v. Mello* is, that the children *living at the time of the distribution of the fund* shall take; if it is to be distributed at the time of the testator’s death, then such children as shall be *then* living; if distributable at the death of some *other* person, then the testator is to be supposed to mean such children as shall be living at the time of the death of such other person. Then the question is whether a gift to the children of *his late sister Mary Crowser* is or is not indicative of an intention different from that which would be imputed to him under the general rule; that is, whether he meant the *particular* children living at the time he made his will to take the fund equally between them, or whether it was not the same thing as if he had given the 2,000*l.* “to the *three* children of my late sister;” for in that case it would have been a legacy to three *personæ designatæ*. Now, when a testator gives a fund to be divided amongst his own children, he shall be supposed to mean such children as shall be living at the time of his death. If so, why should I suppose that, the *sister being dead*, he meant anything else than what would be imputed to him in the other case. This is not like the case of *Lord Bindon v. Earl of Suffolk*, 1 P. W. 96, for there the gift is to the *five* grandchildren;

(b) 1 Bro. C. C. 537.

which shows that he had *particular* objects in view. But the general rule, I take it, comes to this, to *exclude* all children, who, although living at the date of the will, yet die before the testator, and to include all those who are living at the time of the distribution, although born after the will or the death of the testator. Reg. Lib. B. 1787, fol. 752, and 1788, fol. 534.

Viner v. Francis, said by Sir John Romilly, M. R., to be a governing case (17 Beav. 607), is always referred to wherever in devises or bequests to children, as a class, the question arises at what period the persons constituting the class are to be ascertained, and they are to take the benefits conferred upon them. In the absence of any express mention of the period by the testator himself, it is a question by no means easy of solution, inasmuch as in order to carry out his supposed intention, certain rules have been adopted, by no means in accordance with the ordinary principles of construction.

Before examining the cases, and the principle upon which they proceed, we may mention, that where the testator expressly fixes a time at which the class is to be ascertained, his wishes, if in no way contravening the law, as for instance, the rule against perpetuities, must be observed. Thus if a testator makes by will a bequest to children "*now* living," those only who were born at that time will take, all subsequently-born children being excluded (*James v. Richardson*, 1 Vent. 334; T. Raym. 330; *Cole v. Scott*, 1 Mac. & G. 518), and under a gift to children living at the death of another person, the children composing that class, alive at that period, will alone take. *Allen v. Callow*, 3 Ves. 289; *Harvey v. Harvey*, 3 Jur. 949; *Jennings v. Newman*, 3 Jur. 748.

Again the testator may explain what is apparently a gift to a class, to mean a gift only to certain members of it, by subsequently naming them. *Bain v. Lescher*, 11 Sim. 397; see also *Lord Bindon v. Earl of Suffolk*, 1 P. Wms. 96; *Salkeld v. Vernon*, 1 Eden, 64; *Havergal v. Harrison*, 7 Beav. 49; *Leach v. Leach*, 2 Y. & Coll. C. C. 495; *Hall v. Robertson*, 23 L. J., Ch., 241.

In the absence of any express intention of the testator, as to the period when the class of persons entitled under a gift to children is to be ascertained, or, that all the children who may be born at any time should take, the general rule, as laid down in the principal case, "*is to exclude all children who, although living at the date of the will, yet die before the testator, and to*

include all those who are living at the time of the distribution, although born after the will or the death of the testator."

We may here remark, that the rule is applicable to gifts to brothers and sisters (*Devisme v. Mello*, 1 Bro. C. C. 536; *Doe d. Stenart v. Sheffield*, 13 East, 526; *Leake v. Robinson*, 2 Mer. 363), and to nephews and nieces (*Balm v. Balm*, 3 Sim. 492), for a gift to brothers and sisters, or nephews and nieces, eo nomine as a class, is merely another way of describing them as children of the testator's father or mother, or of his brothers or sisters.

It must also be remembered, that a child en ventre sa mère is considered as if actually born. Thus a bequest to children living (*Doe v. Clarke*, 2 H. Black. 399; *Clarke v. Blake*, 2 Ves. jun. 673; overruling *Pierson v. Garnett*, 2 Bro. C. C. 47; *Cooper v. Forbes*, Ib. 63; *Freemantle v. Freemantle*, 1 Cox, 248) or born (*Trower v. Butts*, 1 S. & S. 181; *Whitlock v. Heddon*, 1 Bos. & Pul. 243), at a particular period, will include children en ventre sa mère at that period.

Having made these preliminary remarks, we may next proceed to examine the various rules for determining when, under different circumstances, the period for distribution which, as we have before seen, is the period for determining the class of children to take under a bequest, is to be fixed.

The first rule to be noticed is one laid down in the principal case, viz. that where a person gives a fund to be divided among children, he shall be supposed to mean those living at the time of his death, and not those merely born at the date of the will (as was decided in a case, *Northey v. Strange*, 1 P. Wms. 341; *S. C.* Gilb. Eq. Rep. 136, since overruled), or children born after his death. And the rule is equally applicable whether the gift be to his own children or to those of another person (ante, p. 643), and whether such person be then living (*Horsley v. Chaloner*, 2 Ves. 83; *Hughes v. Hughes*, 3 Bro. C. C. 352), or, as in the principal case, dead. It is immaterial, likewise, that the gift is to "all" the children. Thus in *Scott v. Harwood* (5 Madd. 332), where there was a devise to the use of "all and every the children" of the testator's sister, who had children born before and after the testator's death, Sir J. Leach, V. C., held, that in the absence of any expressed intention in favour of after-born children, those born at the testator's death were alone entitled to take. See also *Heathe v. Heathe*, 2 Atk. 124; *Singleton v. Singleton*, 1 Bro. C. C. 542, n.; *S. C.* 1 Cox, 68, nom. *Singleton v. Gilbert*.

A gift over amongst the survivors in certain events will be construed as meaning the survivors of those who took at the testator's death. Thus in *Davidson v. Dallas* (14 Ves. 576) there was a bequest to children equally to be divided among them, and if either of them should die before the age of twenty-one years their share to go to the survivors, it was held by Lord

Eldon, C., that those children only who were living at the death of the testator were entitled. "The period," said his Lordship, "of division and vesting is the death of the testator; and that which is to be divided and vested at that time may in certain events go over to some of those among whom it was to be divided, and in whom it vested at the testator's death. The difficulty that has always been felt to apply the term "survivors" to those who may not be alive at the time of the distribution taking place, has been met by presuming, that the testator intended persons not then living, but who might come into existence before the distribution; construing the word "survivors" as "others," to take in all who should come into existence before that period. There is nothing in this will indicating a general intention upon which the forced construction of the term "survivors" has been adopted. These words must therefore have their natural meaning." See also *Scott v. Harwood*, 5 Madd. 332; *Berkeley v. Swinburne*, 16 Sim. 275.

Where, however, there is an *immediate* gift to children by will, and, at the period when distribution takes place by the death of the testator, there are *no objects* of the gift in existence, all the children born at any future period will take. Thus in *Weld v. Bradbury* (2 Vern. 705) the testator bequeathed the surplus arising from the sale of his stock, to be put out at interest, and one moiety to be paid to the younger children of the plaintiff living at his death, and the other moiety to the children of J. S. and J. N. Neither J. S. nor J. N. had any child living at the death of the testator. It was held by the Court, that "it must be intended an executory bequest, and to be to such children as they or either of them should *at any time after* have." (*Haughton v. Harrison*, 2 Atk. 329.) The result will be the same in the case of gifts to *future* children, when there are none in existence at the testator's death. *Shepherd v. Ingram*, Amb. 448.

Another rule mentioned in the principal case is, that where a prior interest is given to a person (and it is immaterial whether it be given by the testator or some one else, *Walker v. Shore*, 15 Ves. 122), followed by a gift over to his children, or the children of another person (*Ayton v. Ayton*, 1 Cox, 327); then, as the period for distribution would be at the death of the person taking a prior interest, that would also be the period for ascertaining the class of children which would comprehend all those born previous to the death of the person having a prior interest, and the representatives of such of those children who died previous to that event, to the exclusion of children and the representatives of children born afterwards. Thus in the case of *Middleton v. Messenger* (5 Ves. 136), where there was a bequest to the testator's wife for life, and after an appropriation to answer annuities, the funds were to be equally divided among the testator's brothers' and sisters' children. Sir R. P. Arden, M. R., in giving judgment, said, "It appears

to me upon the face of the will, and according to the construction put upon words of division at the death of tenants for life, and the authority of *Devisme v. Mello* (1 Bro. C. C. 537), that the funds in question were divisible among all the children of his brothers and sisters living at his own death, and such, if any, as might be born before the death of his wife, and the representatives of such as should be dead in the life of his wife. That is fully established in that case, in which every circumstance entertained in this occurs. It is clear upon that case, to which I perfectly subscribe, that under such a disposition the fund is divisible among such of the objects as are living at the testator's death and such as shall be born, and that they are vested interests." See also *Watson v. Watson*, 11 Sim. 73; *Locher v. Bradley*, 5 Beav. 593; *Evans v. Jones*, 2 Coll. 516, 524; *Salmon v. Green*, 13 Jur. 272; *Ayton v. Ayton*, 1 Cox, 327; *Walker v. Shore*, 15 Ves. 122.

Where there is an executory gift over to children, the time for ascertaining the class to take, will be the happening of the event on which the gift over takes effect, the property then becoming distributable, and children born afterwards will not be entitled to a share. Thus in *Ellison v. Airey* (1 Ves. 111), where there was a bequest of 300*l.* to Elizabeth Paxton, to be paid at her age of twenty-one or marriage, and interest in the mean time for her maintenance and education; but *if she died* before twenty-one or marriage, then to the *younger* children of the testatrix's nephew, equally to be divided among them. It was held by Lord Hardwicke, C., that the younger children, at the death of Elizabeth before twenty-one or marriage, were to take. "It is said," observed his Lordship, "the word 'younger' must be restrained to the time of making the will, others say to the death of the testatrix, others to the death of Elizabeth under age and before marriage; and others that it should go to all younger children. To confine it to the time of making, it is said that she had taken notice of, and given by name to, the children then in esse; who are therefore to be considered as the objects of her bounty; but I think it rather holds the contrary way, for where she intends their particular benefit, she names them; when not, she uses the general words 'younger children.' As to her intending it to *all* the younger children, there may be a case of that kind, but it would be liable to all the inconveniences which this Court has endeavoured to avoid. I am of opinion, that it means such as should be younger children at the death of Elizabeth before twenty-one or marriage. It is a contingent legacy, and there is no reason to confine it to the time of making the will or the death of the testatrix, for neither was the time upon which the legacy was to vest; and, therefore, as the whole is suspended till the death of Elizabeth, there is no inconvenience to wait till then. When is this legacy given? At the death of Elizabeth before twenty-one or marriage.

What is to be done with it? To be divided equally. When? That is not specified; but the natural way of thinking is that she intended it should be divided when it vests; and there is stronger reason to think she meant so, for she has directed where the interest should go during the life of Elizabeth; but after her death before twenty-one or marriage, there is no direction about the interest; which is evidence that she intended it to be actually divided at that time; and if it be divided it must be vested." See also *Stanley v. Wise*, 1 Cox, 432; *Haughton v. Harrison*, 2 Atk. 329; *Baldwin v. Rogers*, 3 De Gex, Mac. & Górd. 649.

Although, as we have seen, children born after the death of the testator, and during the existence of a prior interest, will be entitled to share under an immediate gift to children; nevertheless, the existence of trusts for a temporary, partial purpose, as the payment of a life annuity, will not let in children born during the continuance of the trusts. *Singleton v. Gilbert*, 1 Cox, 68; 1 Bro. C. C. 542 n.; *Hill v. Chapman*, 3 Bro. C. C. 391; 1 Ves. jun. 405; *Cort v. Winder*, 1 Coll. 320; see, however, *King v. Cullen*, 2 De G. & Sm. 252.

Where a devise to children of a legal estate in freehold lands is not immediate, as where there be a previous life interest, if there be no children in esse on the determination of the life interest, the limitation over to the children will fail, according to the well-known rule, that a remainder must take effect, if at all, immediately upon the determination of the prior estate (see ante, p. 368). If, however, the limitations are equitable, the legal estate being vested in trustees, the remainder over to the children will take effect as they come into esse, although none of them be born when the estate for life ends. See *Chapman v. Blissett*, Ca. t. Talb. 145.

And, by analogy, if not by authority, it would seem, that a similar bequest of personalty would be followed with similar results (*Wyndham v. Wyndham*, 3 Bro. C. C. 58; *Hutcheson v. Jones*, 2 Madd. 124; *Horseman v. Abbey*, 1 J. & W. 381; *Lord Beaulieu v. Lord Cardigan*, Amb. 533), although some of the remarks of Sir R. P. Arden, M. R., in *Godfrey v. Davis*, 6 Ves. 43 (decided, however, upon special circumstances), and of Lord Brougham in *Bartleman v. Murchison*, 2 Russ. & My. 136, would seem to show it to be their opinion, that unless there were children in existence upon the determination of the life estate, no children afterwards born could take.

In the case of an executory devise or bequest, it seems to be clear that if there are no children in existence at the time of the determination of the prior interest, subsequently-born children will be entitled (*Hutcheson v. Jones*, 2 Madd. 124; *Haughton v. Harrison*, 2 Atk. 329. Although, as we have before seen, had there been any children then in existence, they

would have been solely entitled to the exclusion of subsequently-born children. See ante, p. 647.

Another rule is, that when the period of distribution is fixed on the attainment of some particular age by the children, upon *any* child attaining that age he is entitled to payment of his share and *all* the children will be entitled who are born within that period, while all born subsequently will be excluded. Thus in *Gilbert v. Boorman*, 11 Ves. 238, where there was a bequest to the plaintiff by name and "all the other children hereafter to be born" of a child of the testator, at their respective ages of twenty-one; the plaintiff having attained that age, filed his bill for payment, and Sir W. Grant, M. R., made the decreè, observing, that "children born afterwards were of necessity excluded." See also *Gilmore v. Severn*, 1 Bro. C. C. 582; *Prescott v. Long*, 2 Ves. jun. 690; *Hoste v. Pratt*, 3 Ves. 730; *Whitbread v. St. John*, 10 Ves. 152; *Mower v. Orr*, 7 Hare, 473, 477.

The result would be the same, where any other event is mentioned by the testator as the period at which payment is to be made to the children, as on their death under age leaving issue, or marriage. Thus in the case of *Barrington v. Tristram*, 6 Ves. 345, where a bequest was made for the children of the testator's nephew, lawfully begotten, which shall be living at his decease, or born in due time afterwards, in equal shares, if more than one, *to be transferred to a son or sons at the age of twenty-one*, and to a daughter or daughters *at the like age, or marriage, with consent of the executor*, the dividends to be in the mean time applied for maintenance and education; with survivorship in case of the death of any one or more dying before twenty-one or marriage without leaving any child or children; if leaving any, upon trust for the child or children in the same manner. Lord Eldon, C., said, "The rule of the Court now being to let in *all* children, until there must be a distributive share given to one; the construction upon the whole of this will seems to be, that every child must be let in, until some child attain twenty-one, or dies leaving issue. The first attaining twenty-one must be paid his share, and then it must be apportioned, unless some other prior event would compel you to fix the shares."

The mode of construction adopted by the Court has arisen from an anxiety to provide for as many children as possible with convenience (per Lord Eldon, C., in *Barrington v. Tristram*, 6 Ves. 348). Lord Thurlow, however, in a well-known case (*Andrews v. Partington*, 3 Bro. C. C. 404), said, he had often wondered how it came to be so decided, that the division should take place among the children only in esse when the eldest attained twenty-one, there being, in his opinion, no greater inconvenience in the case of a devise than in that of a marriage settlement, where no one doubts that the same expression means all the children.

It is however said very justly, by counsel, *arguendo* in *Prescott v. Long* (2 Ves. jun. 692), that there is this difference between the two cases; in the case of a settlement it seldom happens that the husband and wife, or one of them, has not a life estate; and the consequence is, that the life estate prevents distribution till after the death of one or both.

And Lord Hardwicke has observed, that there is a great difference between provisions for children by wills and by marriage settlements; "for, as before marriage there are no children to whom it can be applied, it must mean all: and there is no place to draw the line in; nor any reason why it should be for one more than another, and therefore all are entitled." *Ellison v. Airey*, 1 Ves. 114; see also *Jee v. Audley*, 1 Cox, 324, ante, p. 372; *Mainwaring v. Beevor*, 8 Hare, 49.

The rule will not be applicable, where separate legacies payable to the children come out of the general personal estate, and not out of a gross sum; for in such case, in order to avoid the inconvenience of postponing the distribution of the general estate until one of the children attains a particular age, the class will be ascertained and payment made to those composing it at the death of the testator. Thus in *Ringross v. Bramham*, 2 Cox, 384. The testator gave to J. R.'s children 50*l.* to every child that he *hath* by his wife, to be paid to them as they shall come of age; it was held by Sir R. P. Arden, M. R., that the period of distribution was at the death of the testator, and that consequently those children only who were then living were entitled to legacies. "The case of *Gilmore v. Severn* (1 Bro. C. C. 582)," said his Honor, "is distinguishable from this. There a gross sum of 350*l.* was given to the children of Jane Gilmore, to be paid to them in equal shares at twenty-one, and there was no inconvenience in postponing the vesting of those shares, until some one of them attained that age, so as to let in the children born in the mean time, because there was nothing to do, but to set apart the sum of 350*l.*, and the residue of the testator's personal estate might be immediately divided; for whether more or fewer children divided the 350*l.*, still they could have but 350*l.* amongst them. But here there are distinct legacies of 50*l.* to each of the children, and therefore, if I am to let in all the children of these two persons born at any future time, I must postpone the distribution of the testator's personal estate until the death of J. R. or his wife, for I can never divide the residue until I know how many legacies of 50*l.* are payable. . . . At the same time, I think I may fairly construe the word 'hath,' so as to make it speak at the time the will takes effect, and let in the children born between the making of the will and the death of the testator." See also *Storrs v. Benbow*, 2 My. & K. 46; *Mann v. Thompson*, Kay, 638.

It seems also, that, where the consequence of delaying the period of dis-

tribution until a child should attain a certain age would render the gift void for remoteness, the rule will not hold good, and the children living at the death of the testator will alone be entitled to a share in the fund. *Kevern v. Williams*, 5 Sim. 171; *Elliott v. Elliott*, 12 Sim. 276.

It must also be borne in mind, that as there is much injustice in excluding, for the mere sake of the convenience of others, those children born after the eldest one of them has attained a particular age, the Courts are not inclined to extend the operation of such a rule. See *Mainwaring v. Beavor*, 8 Hare, 44.

Questions often arise, as to how the income of a fund is to be disposed of in such cases—between the death of the testator and the birth of a child; and the authorities have determined, that, in the absence of any intention, the income should accumulate for the children till they come in esse, which must, when discovered, be followed (*Gibson v. Lord Montfort*, 1 Ves. 485; *Achers v. Phipps*, 9 Bligh, N. S. 430); such part of it as arises from personalty will be comprised in a residuary bequest, and such part of it as arises from realty in a residuary devise (*Harris v. Lloyd*, 1 T. R. 310; but, in the absence of such residuary devise or bequest, the former would go to the next of kin, and the latter to the heir-at-law as undisposed of. *Bullock v. Stones*, 2 Ves. 521; *Hopkins v. Hopkins*, Ca. t. Talb. 44.

With regard to the income accruing between the birth of the first and the last child, it seems to be settled, that, in the absence of the intention of the testator that all children subsequently born are to participate in previously received income (*Mills v. Norris*, 5 Ves. 335), the child or children in existence will be entitled to the whole. *Shepherd v. Ingram*, Amb. 448; *Scott v. Earl of Scarborough*, 1 Beav. 154; *Mainwaring v. Beavor*, 8 Hare, 44.

An immediate bequest to children “to be born,” or “to be begotten,” will (inasmuch, as those words would be otherwise inoperative) include all the children born after the testator’s death (see *Defflis v. Goldschmidt*, 1 Mer. 417; *Mogg v. Mogg*, 1 Mer. 658; *Gooch v. Gooch*, 14 Beav. 565; 3 De Gex, Mac. & Gord. 366; sed vide *Sprackling v. Ranier*, 1 Dick. 344); except in the case of distinct pecuniary legacies, as that construction would have the effect of postponing the distribution of the general estate, until the death of the parent of the legatees. Thus in *Storrs v. Benbow*, 2 My. & K. 46, a legacy of 500*l.* apiece was left “to each child that may be born to either of the children of either of my brothers lawfully begotten, to be paid to each of them on his or her attaining the age of twenty-one years, without benefit of survivorship;” it was held by Sir J. Leach, M. R., that children born after the testator’s death were not entitled. “This,” said his Honor, “is an immediate gift at the death

of the testator, and is confined to the children then living. The words 'may be born,' provided for the birth of children between the making of the will and the death. The cases of *Sprackling v. Ranier* (1 Dick. 344) and *Ringrose v. Bramham* (2 Cox, 384, ante, p. 650) are direct authorities to this point. To give a different meaning to the words 'may be born,' would impute to the testator the inconvenient and improbable intention, that his residuary personal estate should not be distributed until after the deaths of all the children of either of his brothers." See also *Butler v. Lowe*, 10 Sim. 317, and *Mann v. Thompson*, Kay, 638; sed vide *Defflis v. Goldschmidt*, 19 Ves. 566; 1 Mer. 417; and see and consider *Paul v. Compton*, 8 Ves. 375; *Whitbread v. St. John*, 10 Ves. 152.

There seems to be a general disposition to include in a gift to children as many as possible, unless there be a strong intention shown to exclude some of them. Thus such words as "hereafter to be begotten" (*Hebblethwaite v. Cartwright*, Ca. t. Talb. 31), "which shall be begotten" or "to be begotten" (*Doe d. James v. Hallett*, 1 Mau. & Sel. 124; *Hewet v. Ireland*, 1 P. Wms. 426; 2 Coll. 344, n.), will not confine the bequest to future children, to the exclusion of those then in existence (see also *Christopherson v. Naylor*, 1 Mer. 326); but the context may show that it was the intention of the testator to take in only after-born children. *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 Beav. 453.

Upon the same principle, a bequest to children "born" and "begotten," will include all the children born before the death of the testator. *Browne v. Groombridge*, 4 Madd. 495.

BORASTON'S CASE.

Hil. 29 Eliz., in B. R., Rot. 790, between Hynde and Ambrye (a).

[REPORTED 3 Co. 19 a.]

DEVISE, WHETHER VESTED OR CONTINGENT.]—*Devise of lands for eight years, and afterwards to executors for performance of the will, till testator's son should accomplish his full age of twenty-one years, and when he should come of age, then that he should enjoy the same to him and his heirs: the son died under age:—Held, 1st, that this was a good devise of the term till the son should attain twenty-one, and the interest of the executors continued till such time as he would have been of age if he had lived; 2ndly, that the remainder was executed in the son, and not in contingency; for the adverbs "when" and "then" in this case only denoted the time when the remainder was to take effect in possession, and not when the remainder should vest; for when these adverbs refer to a thing which must of necessity happen (as, in this case, the determination of the term devised to the executors), they make no contingency.*

When the particular estate upon which a remainder depends may determine before the remainder takes effect, the remainder is contingent. So when it is limited to take effect, upon a contingent determination of the preceding estate.

A devise charged with the payment of a gross sum gives an estate in fee.

Words of consideration in a will are construed as a limitation, if by construing the words as a condition the remedy will be defeated.

(a) *Hynde v. Brand, and Ux. and Others v. Ambrye.*

In pleading a lease by husband and wife, the lessee need not allege that it was by deed.

BETWEEN Richard Hynde, plaintiff, and William Ambrye, defendant, in an ejectione firmæ in the King's Bench, of lands in Aldenham, in the county of Hertford, on a lease made by Thomas Brand and Constance his wife, and William Davies and Margaret his wife, to the plaintiff for seven years. The defendant pleaded not guilty, and the jury gave a special verdict to this effect:—Thomas Boraston was seised in fee of the lands aforesaid, and held them in socage, and had issue Humphrey Boraston his elder son, Henry Boraston his younger son; and Humphrey had issue the said Constance, wife of the said Brand, and the said Margaret, wife of the said Davies; and the said Henry Boraston had issue Hugh. And afterwards the said Thomas Boraston, August 12, 1559, by his will, in writing, devised the said lands in these words:—viz. “Item, I give to Thomas Amery and Amphillis his wife all that my upper part of my close called Redding, for eight years next after my decease. And that the said Thomas Amery, nor his assigns, shall, during the said term, fell none of the said wood or timber in or upon the said upper part, but shall preserve the woods to the use and behalf of the heir in remainder: and after the term of the said eight years the said upper part to remain to my executors, *until such time* as Hugh Boraston shall accomplish his full age of twenty-one years, and the mean profits to be employed by my executors towards the performance of this my last will and testament: *and when* the said Hugh shall come to his age of twenty-one years, *then* I will he shall enjoy the said upper part to him and to his heirs for ever.”

And afterwards the said Thomas Boraston, 14 Augusti, anno 1 Eliz., died, and the said Hugh died before his full age of twenty-one years, about the age of nine years. And that Philip Boraston was brother and heir of Hugh Boraston; and the said Philip, after the end and expiration of the said terms, that is to say, of Thomas Amery and Amphillis his wife, and of the said executors, entered into the lands as brother and heir of the said Hugh Boraston, and demised the said lands to the said William Ambrye, &c., by force whereof he was pos-

sessed, upon whom the said lessors of the plaintiff, in right of their said wives, entered into the said lands; and by indenture, bearing date the same day and year mentioned in the declaration, demised to the plaintiff, prout in the declaration, by force whereof he was possessed, until the defendant, by the commandment of the said Philip, entered upon him, &c. And whether the said entry of the defendant was lawful or not, was the doubt which was referred to the Court. And this case was argued by the counsel for the plaintiff. And it seemed to them that no remainder was vested in the said Hugh Boraston, until he attained his age of twenty-one years; and in the mean time that the lands did descend to the daughters of the elder son, who are general heirs to the devisor; and forasmuch as Hugh did never accomplish his said age, for this cause the land never vested in him, but remained in the heirs general; and in proof that the remainder did not vest in Hugh before his said age, they said it appeared by the words of the will, that he should not have it till his said age of twenty-one years. For the words are, "and when the said Hugh shall accomplish his said age of twenty-one years, then I will he shall enjoy the said upper part to him and to his heirs for ever:" so that it fully appears, that this devise to Hugh doth depend on a contingent, that is to say, on the accomplishment of Hugh's full age of twenty-one years, and that ought to precede before the remainder can begin, and whether Hugh shall attain to his age is so uncertain that no man can know, but it depends solely on the providence of God. And it was said, if Thomas Boraston in this case had made a lease till Hugh attain his full age, Hugh then being of the age of nine years, the lessee should not have an absolute lease for twelve years: for if Hugh should die before his full age, the lease would be ended; *quod fuit concessum per totam Curiam.*

It was also said, that when a (b) particular estate (which doth support a remainder) may determine before the remainder can begin, there the remainder shall not presently vest, but shall depend in (c) contingency; as if one makes a lease to J. S. for his life, and after the death of J. D. to remain to another in fee, this remainder doth depend in contingency; for if J. S. dies before J. D., the particular estate is determined before the remainder can begin. So, and on the

(b) 2 Roll. 419; Raym. 144.

(c) 10 Co. 85 a, b; 2 Roll. 419; Litt. Rep. 219.

same reason, it is adjudged, in *Colthirst and Bejushin's Case*, in Plowd. Com., where the case in effect is, that a lease is made to A. (*d*) for life, the remainder to B. for life, and if B. dies before A., that it shall remain to C. for life, this is a good remainder on contingent, if A. survives B.: which case is all one in reason with the common case which is often agreed in our books; a lease is made to one for life, the remainder to the right heirs of J. S., this remainder is good upon a (*e*) contingent; that is to say, if the lessee for life survives J. S.; otherwise not. So, and for the same reason, if a man having issue a son of the age of nine years makes a lease until his son shall attain to his full age, and after he shall accomplish his full age that it shall remain over to another in fee, nothing vests (without question, presently) in him in remainder, which was granted by the whole Court. And it was said by the plaintiff's counsel that such remainder is utterly void, and yet may take effect; for inasmuch as the remainder ought to pass out of the lessor presently, either to him in remainder or to be in abeyance and custody of the law, and a freehold cannot in such case be in (*f*) abeyance, for this cause the remainder is utterly void; and if a (*g*) man makes a lease to A. for twenty-one years, if B. shall live so long, and after the death of B. that it shall remain over in fee, this remainder is void: so if a (*h*) lease for years be made, the remainder to the right heirs of J. S., this remainder is void; *quod fuit concessum per totam Curiam*.

Also it was said, that when a remainder is limited to take effect on the doing of an act, which act will be the determination of the particular estate, yet if the act depends on a casualty and mere uncertainty whether it will ever happen or not, there also the remainder doth depend in contingency, and shall not presently vest; as if (*i*) A. makes a feoffment to the use of B. till C. come from Rome to England, and, after such return from Rome to England, to remain over in fee, this

(*d*) Plowd. 22 a, 21 b; Raym. 144; Lane, 22.

(*e*) Raym. 144; 2 Co. 51 b; Co. Litt. 343 a; 10 Co. 50 b.

(*f*) Co. Litt. 342 b; 9 H. 7, 2 b; Br. "Extinguishment," 53; Plowd. 229 b, 280 a, 486; Litt. s. 647; Plowd. 557 b, 558 a; Dy.

71, pl. 43; 190, pl. 18, 20; Hob. 153, 281; 1 Co. 150 a, 135 b; 3 Co. 2 a, 10 b; Hob. 94, 171, 253, 335, 336, 338.

(*g*) Raym. 144; 2 Co. 55.

(*h*) Hob. 153.

(*i*) Litt. Rep. 316.

remainder doth depend in contingency, for it is uncertain whether C. will ever return into England or not ; which was granted by the whole Court. And so it was concluded by the plaintiff's counsel, that for all these causes judgment ought to be given for the plaintiff.

Against which it was argued by the defendant's counsel, and they conceived, the remainder vested in Hugh presently, by the death of the devisor, and by his death without issue, the land did descend to Philip his brother, who leased to the defendant. For it was said, that in this case, although Hugh died before his full age, yet the interest and term of the executors did not cease ; and their reason was, because in wills the (*j*) intent of the devisor is to be considered ; and when he deviseth his lands to his executors, until Hugh his son shall come to his full age, for payment of his debts, and to perform his will, it is to be intended he hath computed (*k*) that the profits to be taken of his lands by his executors, during the minority of his son (which was for the space of twelve years), would suffice to pay his debts, and perform his will, and that he did not intend it should determine by the death of his son ; for then the means which he had prescribed, to satisfy his debts and perform his will, would be defeated, and by consequence his debts remain unsatisfied, and his will unperformed ; and therefore this case of a devise doth differ from a lease or a grant made in the like manner. For the devisor is intended to be (*l*) *inops consilii*, and therefore the law will be his counsel, and, according to his intent appearing in his will, will supply the defect of his words ; and therefore where the devisor saith (*m*), "until such time as Hugh Boraston shall accomplish his full age of twenty-one years." The law which favours the performance of wills according to the intent of the devisor in construction, will make it until such time as Hugh Boraston should have come to his full age of twenty-one years ; for when the devisor by apt words and terms, might have by good advice made his will good and sufficient in law, according to his true intent, there although the devisor being hindered by sickness or for want of good advice, makes his will in a disordered manner and in barbarous and unfit words, the

(*j*) Bulst. 128 ; 3 Co. 27 b ; Co. Litt. 322 b ; Fitzgib. 10.

(*k*) 2 Bulst. 125 ; Lane, 58.

T. L. C.

(*l*) Co. Litt. 9 b ; 8 Co. 95 a ; 3 Bulst. 106 ; 1 Co. 85 b.

(*m*) Swinb. 135 ; 2 Bulst. 125.

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law in such case will reduce his words which want order into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words. As Mich. 32 & 33 Eliz., in the King's Bench, it was adjudged between (n) Wellock and Hammond in trespass, upon not guilty pleaded, the case upon special verdict was such; a copyholder in fee of lands descendible in Borough-English, having three sons and one daughter, devised his land to his eldest son (o), paying to his daughter and to each of his other sons 40s. within two years after his death; the deviser made a surrender according to the custom of the manor, to the use of his will, and died; the eldest son is admitted, and doth not pay the money within two years; the youngest son, now plaintiff, entered into the land; and it was adjudged, that his entry was lawful: and in that case two points were resolved.

1st. Although the yearly profits of the lands for two years exceed the money to be paid to his sons and daughter, yet the eldest son had a fee simple; for the recompence and consideration, although it be not to the value of the land, in case of a will, doth make it in construction a fee simple: and in the books of (p) 4 E. 6, "Estates," Br. 78, and 29 H. 8, "Testament," 18, 22 Eliz., Dyer, 371 (q), no mention is made of the value of the land, no more than in the case of bargain and sale of land in 4 E. 6, "Estates," 78, yet the fee simple of the use shall pass.

2. It was resolved, although in the case of a will this word "paying" makes a condition; yet in that case the law would construe this unapt word "paying" to a limitation; for if it should be a condition, then it would descend on the eldest son, and then it would be at his pleasure whether his brother or sister should be paid or not; and therefore it

(n) Cro. Eliz. 204; 1 Co. 41 a; Cro. Jac. 57, 527, 592; 2 Bulst. 273; Latch. 9; Bridgm. 138; 1 Mod. Rep. 86; Vaugh. 271; Cart. 93, 226; Swinb. 113, 114; 2 Leon. 114; 2 Roll. Rep. 219; Bridgm. 138; Goldsb. 134; Cro. Car. 158.

(o) Swinb. 113; Co. Litt. 9 b, 236 b; Bridgm. 138; Goldsb. 134; Cro. Eliz. 205, 333, 378, 919; Cro. Car. 158, 159; Cro. Jac. 416, 527, 591, 599, 600; Godb. 280; 2 Roll. Rep. 80; Noy, 51; Moore, 644;

3 Keb. 96; 1 Mod. Rep. 263; Litt. Rep. 259; 2 Jones, 107; Hob. 65; Dy. 371, pl. 5; B. N. C. 125; 29 H. 8, Br. "Testam." 181; Cart. 226; 1 Vent. 227; 4 E. 6, "Estate;" Br. 78; O. Ben. 24, 25.

(p) Cro. Jac. 527, 416; Co. Litt. 9 b; 6 Co. 16 a; Swinb. 118; Cro. Eliz. 205; 29 H. 8; Br. "Testament," 18.

(q) Dy. 371, pl. 5; Cro. Jac. 527; Co. Litt. 9 b.

was adjudged, that in that case the law would construe it for a (r) limitation, of which the youngest son in Borough-English might take advantage, and to amount to as much as if he had made the devise of the land to his eldest son, till he shall make default of payment, &c.; and so the doubt in 14 Eliz., Dyer, 317 (s), moved by Manwood is well resolved. Upon which it was concluded in the case at bar by the defendant's counsel, that the executors had a good term (t) for twelve years, which was not determined by the death of Hugh Boraston, which was granted by the whole Court. And the general rule put by the counsel on the other side was well agreed, that the remainder ought to commence in possession, when the (u) particular estate ends, as well in wills as in grants, and there cannot be a mean time between them; but that doth not concern the case at bar; for here, inasmuch as the term did not end by the death of Hugh Boraston, the remainder did begin in possession (x) at the end of the term. And as to the uncertainty, it was said that the case at bar is no other in effect, but that a man devises his lands to his executors (for the payment of his debts) until (y) his son shall or should come to his full age of twenty-one years, the remainder to his son in fee; for although these are adverbs of time "when," &c., and "then," &c., yet they do not amount to make any thing to precede the settling of the remainder, no more than in the common case (z). A man had land for life or years, and after the decease of the lessee, or the term ended, the remainder to another, yet it shall remain presently; for when these adverbs refer to a thing which must of necessity happen, there they make no contingency: and it is certain that every man must die, for *statutum est hominibus semel mori*; and every term will end, for *tempus edax rerum*: and in the case at bar, certain it is that Hugh would or might have accomplished his age of twenty-one years, which are, in this case of a will, all one in

(r) Dyer, 74, pl. 16; Plowd. 413 a; 10 Co. 41 a; Cart. 93, 171; Cro. Jac. 57; 2 Roll. Rep. 219, 425; Cro. Eliz. 205, 833, 920; Goldsb. 134; Noy, 51; Owen, 112; Plowd. "Queries," 108; 1 Leon. 283; 1 Roll. 411.

(s) Dyer, 316 b, pl. 5; 2 Leon. 114; 1 Mod. Rep. 86.

(t) Cro. Jac. 510; Hard. 80.

(u) 1 Co. 66 b, 129 b, 130 a, 134 b, 136 b, 138 a; 2 Co. 51 a; Plowd. 25 b, 29 a, b; Raym. 54; 2 And. 37; Moore, 104; Perk. 12; Raym. 413; Palm. 139; Poph. 82, 83, 84.

(x) 10 Co. 85 b.

(y) Sty. 204; Dall. 58; Moore, 48.

(z) 10 Co. 85 b; Cro. Jac. 510; Palm.

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construction of law. So that these adverbs "*then*" and "*when*" in one case are demonstrations of the time when the remainder to Hugh shall take effect in possession, as in the said cases of a lease for life, and lease for years, and not when the remainder shall vest, *quod fuit concessum per totam Curiam*. And judgment was given that the plaintiff should take nothing by his bill. Egerton, the Queen's solicitor, Thomas Forster and others were of counsel with the plaintiff, and Coke and others with the defendant; and note, in the declaration it doth not appear that the husbands and wives made the lease to the plaintiff by deed, and no exception was taken to it.

LADY PAWLETT v. LORD PAWLETT (a).

De Term. Pasch., 13 Maii, 1685.

[REPORTED 1 VERN. 321.]

Term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage. One of them dies under twenty-one and unmarried:—Held, that her portion shall not be raised for the benefit of her administratrix, though it would have been otherwise in the case of a legacy.

JOHN, LORD PAWLETT, by indentures of lease and release, 7 and 8 Maii, 1679, conveys several manors and lands to trustees and their heirs, to the use of himself for life, without impeachment of waste, and after his death to other trustees for the term of 500 years, upon the trusts thereafter declared, and then limits several remainders over. The trust of the term of 500 years, was declared to be for raising monies by rents and profits, or by leases to be derived out of the term for 500 years (b), in the first place to pay the Lord *Pawlett's* debts, as also such yearly maintenance for every younger son and daughter as was thereafter expressed; and after payment of his debts, and such maintenance as aforesaid, then to pay all such sums for all and every younger son and daughter, as the said Lord *Pawlett* had or should have, and at such time and times and in such manner as he should by writing or by his last will appoint; and in

(a) *S. C.* 1 Vern. 204; 2 Ch. Rep. 286; 2 Vent. 366; 1 Eq. Ca. Abr. 267, pl. 1.

(b) The words of the trust are, "that the said trustees should, after the commencement of the 500 years, either out of the clear yearly rents or profits, or out of so

much of the premises, or by granting leases, or any other lawful way, allow to the defendant, Lord *Pawlett*, a yearly maintenance, and should levy so much more money as should be sufficient for payment of his debts." Reg. Lib.

default of such appointment, the trustees should in convenient time after such debts as aforesaid should be satisfied, and not before, raise and levy out of the premises 4,000*l.* apiece, for each and every younger son, and 4,000*l.* apiece for each and every daughter of the said Lord *Pawlett* on the Lady *Susanna* his second wife begotten, *payable at (c) twenty-one or marriage*, which should first happen; with this further, that in case the said Lord *Pawlett* should not otherwise direct by will, every younger son and daughter should be allowed such competent yearly maintenance and education as should be thought requisite, till the portions should be respectively paid, so as such maintenance did not exceed 150*l.* per annum for a son, and 100*l.* per annum for a daughter; and after the performance of these trusts (and some other trusts therein mentioned), the trustees were to surrender so much of the 500 years term as should remain, to whom the immediate reversion should belong.

The Lord *Pawlett* by his will dated the 29th *May*, 1679, devises to his two daughters by the said *Susanna* his wife, 4,000*l.* apiece, for their respective portions, to be raised and paid to them respectively, in such manner as in the said indenture is directed; and further wills, that they should have the same yearly maintenance, until their respective portions should be raised, as by the said indenture was appointed; provided that by virtue of his will, or of the said indenture or otherwise, all put together, his daughters should not have more than 4,000*l.* apiece for their portions; unless his son and heir-apparent should happen to die without issue, and then they should have 2,000*l.* apiece more.

The Lord *Pawlett* dies, leaving issue by the Lady *Susanna* one son, viz. the defendant the Lord *Pawlett*, and two daughters *Susanna* and *Vere*.

Before any part of the portion of *Vere* could be raised she (12 *December*, 1681) dies under age, and unmarried; and administration of her estate is granted to the plaintiff her mother, who brings her bill against the heir and the trustees, to have the said legacy of 4,000*l.*, and interest for the same from the death of *Vere*, raised out of the trust estate.

This matter coming on this day to be argued upon a case stated specially

(c) "To be paid." Reg. Lib.

by a master, the sole question was, whether as this case is, the Lady *Susanna* is entitled to have the 4,000*l.* and interest raised out of the said estate.

For the plaintiff it was insisted, *first*, that the 4,000*l.* was *debitum in presenti*, but payable *in futuro*, and therefore, being an interest vested, it ought to go to the administratrix.

Secondly. That this 4,000*l.* is a duty arising by the will, and is in the nature of a legacy; for the deed was to take place only in case the Lord *Pawlett* had made no appointment by his will; and in all cases of construction, equity ought to favour the right that goes in a course of administration; and though now the case falls out to be between the mother and heir-at-law, which of them shall have the benefit of this 4,000*l.*, and the plaintiff's counsel would draw an equity from thence in favour of the heir; whereas it might have so happened, that the son might have died in the lifetime of his sister, and then the controversy would have been between the mother and the half-sister; and there ought to be the same rule in both cases; and suppose this portion had been made payable at twenty-one only, and the daughter had married and died under twenty-one leaving children, it would be hard by a construction in equity to deprive the daughter's children of this 4,000*l.*: and it was urged that the deed being penned, that, after all portions paid, the Lord *Pawlett* should have the estate, it was not thereby meant, that he should have it before all the portions were raised and paid.

For the defendant it was insisted, that the case depends upon the deed, and not upon the will, which only confirms the deed, and is a case purely in construction, and a matter of trust, and therefore equity ought to favour the heir in such a case; and the case of *Bond* and *Brown* was cited, as a case in point, which was decreed last term by the Lord Keeper in favour of the heir; and what was principally relied upon was, that this was not a legacy, nor did arise by the will; for then, it was admitted, it must have gone in a course of administration (*d*); but the duty arose upon the deed, and was given under the notion of a portion, and not as a legacy, and a maintenance is appointed in the mean time; and it was not intended that the daughter should

(*d*) See *Bond's Case*, 2 Ch. Cas. 165.

dispose or have any interest in the 4,000*l.* till marriage, or twenty-one.

Lord Keeper *Guildford*.—This is a case both great in value and in its consequence, and I find no precedent on either side; the case of *Bond* and *Brown* being a new case, and decreed but last term, is not to be urged as a precedent.

As to a legacy devised by will, I take the law to be settled, that where it is *debitum in præsentis*, though not payable till a future day, it shall go in a course of administration; and the reason is, that it takes place on the personal estate, and depends purely on a will, which is to be construed and expounded in the Spiritual Court; and in such case it is but just that the legacy should go in a course of administration, in regard it comes out of the personal estate; and it is indifferent whether the executor of the first or the last takes it: and so it is where a sum of money is by will only devised payable out of land(e); because it has been looked on as a legacy; but where it stands upon a deed only, as I take it it does in this case, the will being only a confirmation of the deed (and so it would have been if the Lord *Pawlett* by deed had only raised a trust for payment of such portions as he by will should appoint), the case is quite of another consideration; and here the plaintiff has no title at law, neither is there any demand according to the letter of the deed; but the plaintiff would have the trustees decreed to raise a portion, which according to the letter of the deed never became payable, and would have no force or construction in favour of the plaintiff the Lady *Pawlett*, in prejudice to the heir-at-law; but I see no reason to decree for the plaintiff; and the rather, for that the 4,000*l.* is to come wholly out of the lands, and the personal estate no way subjected or made liable to the payment of it by the will, and therefore the bill must be dismissed.

Note.—This decree was affirmed upon an appeal to the House of Lords (f).

(e) It is said in Ventris's report of this case (2 Ventr. 367), that the lord keeper did not seem satisfied with the reason of that case, and is clearly against the subse-

quent authorities. See post, note.

(f) Journ. Ho. Lords, 14, vol. 87, 19 Nov. 1685.

STAPLETON v. CHEALES (a).

De Termino, S. Mich. 1711.

[REPORTED PREC. CHAN. 317.]

A legacy bequeathed to an infant, payable or to be paid at the age of twenty-one, is an interest vested so that it shall go to the personal representatives of the infant, though he die before that age; secus if bequeathed to an infant at twenty-one, or if or when he shall attain the age of twenty-one, unless interest were given in the mean time. Distinction as to a portion to arise out of lands or a term of years.

IN this case it was urged by council at the bar, and agreed to by the Court, that if a legacy be bequeathed to one generally to be *paid* or *payable* at the age of twenty-one years, or any other age, and the legatee die before that age; yet this was such an interest vested in the legatee, that his executors (b) or administrators may sue for and recover it, and with this agrees the law of the Spiritual Court as was reported by Dr. Awbery, 1 Leon. 177; Godb. 182; for this is *debitum in presenti*, though *solvendum in futuro*; but if a legacy be bequeathed to one *at* twenty-one, or *if* or *when* he shall attain the age of twenty-one years, and the legatee dies before that age, in this case the legacy is lapsed, and shall not go to his executors or administrators.

But if in that case the testator had added, that in the mean time, or until the legatee attains that age, he shall have interest for the said

(a) *S. C. Gilb. Eq. Rep.* 76; 2 Vern. 673; nom. *Stapleton v. Cheele*, 1 Eq. Ca. Abr. 295, pl. 4.

(b) Previous to the late Wills Act, 1 Vict. c. 26, female infants at the age of twelve,

and male infants at the age of fourteen, were competent to dispose of personalty by will. See Harg. Co. Litt. 89 b; *Hyde v. Hyde*, Prec. Ch. 316.

legacy at such a rate, from the time of his (the testator's) decease, this subsequent clause explains the intent of the testator, so as to make the legacy, which was the principal, an interest vested, which shall go to his executors or administrators, though the legatee die before that age; because, if the principal were not due presently upon the testator's decease, there could no interest accrue to the legatee at that time; and this has been settled in *Clobberie's Case* (c), and in *Yates v. Phettiplace* (d), and several other cases in this Court.

But if such portion were to arise out of lands, or a term for years, though it were limited to the party generally to be *paid*, or *payable* at such an age, there for the benefit of the heir, the portion should sink, and not go to the representatives of the party so dying.

The Master of the Rolls (Sir *John Trevor*) said, the provision for payment of interest in the mean time, where the legacy was given generally *at*, or *if*, or *when* the party should attain such an age, that that should make it an interest vested presently, was an alteration of the law from what was held in Co. Litt. 292, when he read that book, (which was fifty years ago,) though the reason of the law as then taken, was because there was no such additional clause to explain it.

(c) 2 Ventr. 342, 346; 3 C. 2 Ch. Cas. 155; nom. *Lampen v. Clobberie*, Freem. Ch. Rep. 24; nom. *Clobberie v. Lampen*, 1 Eq. Ca. Abr. 294; affirmed in the House of Lords,

on appeal. See Journ. of the House of Lords, vol. 14, p. 241.

(d) 2 Vern. 416; Prec. Ch. 140.

HANSON v. GRAHAM.

—◆—
 July 2nd and 8th, 1801.

[REPORTED 6 VES. 239.]

The word "when" in a will, alone and unqualified, is conditional; but it may be controlled by expressions and circumstances, so as to postpone payment or possession only, and not the vesting; as where the interest of the legacy in the interval was directed to be laid out at the discretion of the executors for the benefit of the legatees, it vested immediately.

JAMES GRAHAM by his will, dated the 18th of March, 1771, gave to Mary Hanson, Thomas Hanson, and Rebecca Graham Hanson, the three children of his daughter Mary Hanson, 500*l.* apiece of Four per Cent. consolidated Bank Annuities, *when* they should respectively attain their ages of twenty-one years, or day or days of marriage, which should first happen, provided it was with such consent of his executors and trustees as therein mentioned; and he declared, his mind and will was, that *the interest* of the said several 500*l.* amounting in the whole to 1,500*l.* Four per Cent. consolidated Bank Annuities, so given to his three grandchildren, as aforesaid, as often as the same should become due and payable, should be laid out at the discretion of his executors and trustees in such manner as they or the survivor of them should think proper for the benefit of his said grandchildren, till they should attain their respective ages of twenty-one years or day or days of marriage, and to and for no other use, intent or purpose whatsoever; and after devising his real and leasehold estates, and giving two lega-

cies of 10*l.* each, he gave all the residue of his personal estate to his son Isaac Graham; and appointed him sole executor.

The testator died soon after the execution of his will. Afterwards, in 1774, Rebecca Graham Hanson died intestate at the age of nine years; leaving her mother, and her brother Thomas Hanson, and her sister Mary Coates surviving.

The mother died; and bequeathed all her personal estate to her son Thomas Hanson, and appointed him executor.

The bill was filed by Thomas Hanson and Mary Coates, against Isaac Graham, for an account of what was due in respect of Rebecca Graham Hanson's legacy of 500*l.*, &c.

Mr. *Richards* and Mr. *W. Agar*, for the plaintiffs.—The plaintiffs insist, that though Rebecca Graham Hanson died under the age of twenty-one and unmarried, she took a vested interest in this legacy. Upon the first part of the bequest there would be a vested interest immediately on attaining the age of twenty-one or marriage: the word “when” not making a condition precedent, but only postponing the payment, according to a great number of cases. The last are *Doe v. Lea* (a), *May v. Wood* (b), and *Booth v. Booth* (c); in which all the others are noticed. *Booth v. Booth*, was the case of a residue; upon which certainly some distinctions have been taken; and Lord *Alvanley* in that case acknowledges, that there is some distinction, notwithstanding what he says in *Love v. L'Estrange* (d), in *May v. Wood*, which was the case of a particular legacy. In this case, however, the rest of the will puts the case beyond all argument, the interest being given to the children; which will raise a vested interest, even though the capital should be given in words importing a contingency. *Stapleton v. Cheales* (e), is the leading case upon that point, which was acted upon in a great number of cases. *Fonereau v. Fonereau* (f); *Hoath v. Hoath* (g); *Walcot v. Hall* (h); *Lampen v. Clowbery* (i),

(a) 3 T. R. 41.

(b) 3 Bro. C. C. 471.

(c) 4 Vea. 399.

(d) 3 Bro. P. C. 337.

(e) Prec. Ch. 317; 2 Vern. 673, ante,

p. 665.

(f) 3 Atk. 645; 1 Vea. 118.

(g) 2 Bro. C. C. 3.

(h) 2 Bro. C. C. 305.

(i) 2 Ch. Ca. 155.

or *Clobberie's Case* (k). In this case the time is pointed out on account of the person to whom the legacy is given.

Mr. *Romilly* and Mr. *Martin*, for the defendant.—This question, like all others upon wills, is a mere question of intention. The rules that have been established must be admitted: that, for instance, mentioned in *Stapleton v. Cheales*; where the legacy is given at a certain period, and where the period is pointed out only as the time when the benefit intended is to come with enjoyment; or as it is better expressed in modern times, where the time is annexed to the substance of the gift, and where to the payment only. There never was a case in which the time was more clearly annexed to the substance of the gift; where it has been more clearly expressed to be given at the time mentioned, and not merely to be paid at the time, *May v. Wood* and *Booth v. Booth* are not in the least applicable: the time being immediately connected with the payment. The Master of the Rolls, in *May v. Wood*, professing to lay out of his consideration the words “equally to be divided,” overturns the whole class of cases. In the same case the Master of the Rolls also professed not to distinguish between a residue and a particular legacy: but in *Booth v. Booth* that is retracted. No case has determined that the words “when,” “if,” “at,” alone will vest. Two periods are here mentioned, the age of twenty-one, or marriage with consent. Suppose any of them had married without consent: would it have vested?

Upon the particular intention in this case there can be no doubt. The whole residue is given by the testator to his son. The reason for fixing these periods in giving the legacies to his grandchildren is, that those were the times when it would be necessary for them to receive their portions or advancements; before which they were not likely to have occasion for them. If he had foreseen the event, that one would die at the age of nine years, he could not have intended the mother to take what he gave in the nature of a portion, placing himself in loco parentis. That circumstance leads to the conclusion, that he did not intend the legacy to vest, if the legatee did not live to the time pointed out. In many cases the Court has gone expressly upon that ground; holding that a portion from a person in loco parentis would not vest; though one

(k) 2 Vent. 342.

from a stranger would. I admit, a legacy, given at the age of twenty-one, with interest in the mean time, will be vested. The reason is, that when the testator directs interest to be paid out of that legacy in the mean time, he means to separate that legacy from the bulk of the estate immediately; though it is not to vest in actual enjoyment until the future time. A considerable distinction arises upon the circumstance, that this is a legacy of stock. The dividends are something actually existing; and a distribution is necessary. They are not like interests of a legacy to arise at a future time; which would not exist unless particularly given. The direction, therefore, that interest is to be paid in the mean time, is separating that from the rest of the property. The dividends must arise, whether any disposition is made of them or not. The early authorities proceed upon technical reasoning, and not so much upon the intention as the subsequent cases. Upon the argument from the gift of the dividends, the words of contingency are nugatory, though, generally speaking, a gift of the interest vests the legacy, a direction for maintenance is not equivalent to a gift of the interest (*Pulsford v. Hunter* (1)). A gift of the dividends for maintenance is not equivalent to a gift of the interest; and that is the object here.

Mr. *Richards*, in reply.—The judgment of Lord Alvanley in *May v. Wood*, certainly applies to the first part of this will, if it stood alone. His Lordship certainly put out of his consideration the words “equally to be divided;” without those words this is in the same terms, upon an uncertain event. *Booth v. Booth*, though a case of a residue is applicable. But upon the latter part of the will it is impossible to doubt. All the cases agree that, generally speaking, a gift of the interest vests the legacy. There may be cases, I admit, where the interest may be separated from the body; but in this will it is given in respect of the body of the legacy. There is no distinction as to stock; that in the one case it is separated more than in the other. *Pulsford v. Hunter* does not apply. The maintenance may not be equal to the interest of the legacy. A part only may be given for maintenance. In this will certainly the intention appears to vest the interest, as it should accrue from time to time. It is not given for

(1) 3 Bro. C. C. 416.

maintenance; as it was specifically in *Heath v. Heath*. But the interest is given, and upon the general rule that draws the substance with it.

Sir *William Grant*, M. R.—The question is, whether this legacy vested. It is contended for the plaintiffs, that it did vest, upon two grounds: first,—they say, it would have been vested, supposing that there was nothing more than the words with which the clause begins; and that if it rested upon a legacy, when the legatee should attain the age of twenty-one or marriage, it is now settled that these words give a vested interest, and that is established by *May v. Wood*; and undoubtedly a proposition is there laid down, which would have the effect of making this a vested legacy; if it is true in the extent there stated. The proposition is there laid down very broadly and generally by the late Master of the Rolls, that all the cases for half a century upon pecuniary legacies have determined the word “when” not as denoting a condition precedent, but as only marking the period when the party shall have the full benefit of the gift; except something appears upon the face of the will to show that his bounty shall not take place, unless the time actually arrived.

This proposition is stated so broadly and generally, that I rather doubt the correctness of the report. Considering the well-known diligence of the late Master of the Rolls in examining cases, and his uncommon accuracy in stating the result of them, he would hardly have drawn this conclusion from an examination of the cases; for no case has determined that the word “when,” as referred to a period of life standing by itself, and unqualified by any words or circumstances, has been ever held to denote merely the time at which it is to take effect in possession; but standing so unqualified and uncontrolled it is a word of condition, denoting the time when the gift is to take effect in substance. That this is so, is evident upon mere general principles; for it is just the same, speaking of an uncertain event, whether you say “when” or “if” it shall happen. Until it happens, that which is grounded upon it cannot take place. In the civil law the words “cum” and “si” as referred to this subject, are precisely equivalent; and from that law we borrow all, or, at least, the greatest part of our rules upon legacies; and particularly the rule upon the subject immediately under consideration in that case, with reference to the words by which a testator

denotes his intention as to the gift taking effect, or taking effect in possession. In the Digest (m), "*Si Titio, cum is annorum quatuordecim esset factus, legatum fuerit, et is ante quartumdecimum annum decesserit, verum est, ad heredem ejus legatum non transire; quoniam non solum diem, sed et conditionem hoc legatum in se continet, si effectus esset annorum quatuordecim. Qui autem in rerum natura non esset, annorum quatuordecim non esse non intelligeretur. Nec interest, utrum scribatur, si annorum quatuordecim factus erit, an ita: cum priore scriptura per conditionem tempus demonstratur; sequenti per tempus conditio: utrobique tamen eadem conditio est.*"

It is very true the word "when," not so standing by itself, but coupled with other expressions or circumstances, that have a reference to the time at which the possession of the thing is to take place, has been held by the civil law not to have so absolute a sense that it cannot possibly be controlled. Another passage in the Digest (n) is thus expressed, "*Seius Saturninus Archigubernus ex classe Britannica testamento fiduciarium reliquit heredem Valerium Maximum trierarchum: à quo petit ut filio suo Seio Oceano, cum ad annos sedecim pervenisset hereditatem restitueret. Seius Oceanus antequam impleret annos, defunctus est.*" Then it states, that a claim was made by the uncle of Seius, as next of kin, which was resisted by the fiduciary heir, who contended, that as Seius had not lived to the age of sixteen, it was not vested. The opinion is this;—"Si Seius Oceanus, cui fideicommissa hereditas ex testamento Seii Saturnini, cum annos sedecim haberet, à Valerio Maximo fiduciario herede restitui debeat, priusquam præfinitum tempus ætatis impleret, decessit: fiduciaria hereditas ad eum pertinet, ad quem cætera bona Oceani pertinuerint: quoniam dies fideicommissi vivo Oceano cessit: scilicet si prorogando tempus solutionis, tutelam magis heredi fiduciario permisisse, quam incertum diem fideicommissi constituisse, videatur."

This distinction was transferred from the civil law to ours; at least, so far clearly as regards pecuniary legacies. In the case cited *Stapleton v. Cheales*, it was clearly held, that the expressions "at twenty-one," or "if," or "when" he shall attain twenty-one, were all one and the same; and in each of those cases if the legatee died before that

(m) Lib. 36, tit. 2, s. 22.

(n) Lib. 36, tit. 1, s. 46.

time, the legacy lapsed. I do not find any case in which this position has been ever contradicted. In *Fonnereau v. Fonnereau* (o), it was clear, if it had stood upon the first part of that bequest, it would have been held not vested. Lord *Hardwicke* rests entirely upon the subsequent words, as controlling the word "when," as it would have operated standing alone. That will sets out precisely as this does; but when it went on with words, making the intention clear, giving interest for his education, with a power to the trustees to lay out any part of the principal to put him out apprentice, and the remainder to be paid to him when he should attain the age of twenty-five, it was clear, upon the whole nothing but the payment was postponed.

A distinction has been introduced between the effect of giving a legacy *at* twenty-one, and a legacy *payable at* twenty-one. That is also borrowed from the civil law. The code thus states it:

"Ex his verbis, *do lego Æliæ Severinæ filia meæ, et Secundæ decem: quæ legata accipere debet, cum ad legitimum statum pervenerit*: non conditio fideicommisso vel legato inserta, sed petitio in tempus legitimæ ætatis dilata videtur." For there the words were, that the time of payment was to be at her legitimate age. "Et ideo si Ælia Severina filia testatoris, cui legatum relictum est, die legati cedente, vita functa est: ad heredem suum actionem transmisit; scilicet ut eo tempore solutio fiat, quo Severina, si rebus humanis subtracta non fuisset, vigesimum quintum annum ætatis impleset." (Cod. lib. vi. tit. 53, s. 5.)

This distinction, however, has been held by some Equity Judges altogether without foundation; and by others it has been treated as too refined. Lord Keeper *Wright*, in *Yates v. Fettiplace* (p), alluding to the distinction in *Godolphin* and *Swinburne*, from the civil law, declared it altogether without foundation. Lord *Cowper* acknowledged that it was at least a refinement; but he thought it was now well established. Lord *Hardwicke* likewise said, it was originally a refinement (q). But in what did that refinement consist? It was in not holding, that it should not vest before the age of twenty-one, but in holding, that it should vest though the party should not attain that age: their opinion being that it should not vest. Then why should we refine upon a

(o) 3 Atk. 645; 1 Ves. 118.

(p) Prec. Ch. 140; 2 Vern. 416.

(q) See *Mackell v. Winter*, 3 Ves. 536;

Bolger v. Mackell, 5 Ves. 509.

refinement, by deviating still more, and holding arbitrarily, that the word "when" standing by itself does not import condition? I say, that standing by itself it does import condition; and it requires other words to show it was meant to defer payment. But according to the report of the judgment in *May v. Wood*, it is quite the reverse; that standing alone it imports delay of payment; and other words are necessary to show a condition. That is a distinction upon a distinction; which original distinction has by several great Judges been held to have been originally a refinement. The only cases alluded to in *May v. Wood*, are cases of real estate; beginning with *Boraston's Case* (r), and ending with *Doe v. Lea* (s). The principal of them all is stated by Lord *Mansfield*, in *Goodtitle v. Whitby* (t), in a way that renders them perfectly consistent with the opinion I entertain as to the word "when" standing by itself, unqualified and uncontrolled. Lord *Mansfield* there lays down these rules of construction:

"1st. Wherever the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property."

"2ndly. Where an absolute property is given, and a particular interest in the mean time, as until the devisee shall come of age, &c., and when he shall come of age, &c., then to him &c., the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession."

There could be no doubt of the intention there. Everything was given to the trustees for the benefit of the infant. He was entitled ultimately to have the whole. The reason of giving to the trustees in the mean time evidently was, that he was not intended to have the possession and management until the age of twenty-one.

Upon exactly the same ground was *Boraston's Case*. It was not alleged in that case that these were not words of contingency, taken by themselves; but it was said, you must model these unapt words, so as to get at the intention from the whole will. The evident intention was to defer payment for a particular purpose, as if he had calculated how many years it would take to pay off his debts, and in how many

(r) 3 Co. 9 a; ante, p. 653.

(s) 3 T. R. 41.

(t) 1 Burr. 223.

years Hugh Boraston would attain the age of twenty-one; and if given to the executors, with remainder to him at twenty-one, it would be clear vested remainder. The Court approves that argument of the counsel; but does not say, that "when," standing by itself, would not have made a condition. So in *Manfield v. Dugard* (u), it was clear the testator meant to postpone the enjoyment of the son for the sake of the antecedent benefit of the wife; but he clearly meant a vested remainder, not contingent, whether the son should take any benefit at all in the estate. But that makes a very different question from this; whether, where there is no precedent estate, no purpose whatsoever, for which the enjoyment was to be postponed, you shall say the enjoyment only is to be postponed. So in *Doe v. Lea*, the devisee was intended to have the whole benefit; but trustees were interposed, to keep the management of the estate until he should attain the age of twenty-four, with a charge, out of the rents and profits, to keep the buildings in repair. There was a reason for postponing the possession, and it was evident nothing but the enjoyment was intended to be postponed. It was not a bare devise to him when he should attain twenty-four.

If those cases therefore had occurred as to pecuniary legacies, there is no ground to say the decision ought to have been different; for from the very same circumstances and expressions it might be collected that the word "when" was used, not as a condition, but merely to postpone the enjoyment; the possession in the mean time being disposed of in another way. It is impossible that Lord Mansfield, and there is nothing in his judgment indicating it, could have considered the word "when," standing by itself, as other than a word of condition. It is impossible; for only two days before, in *Goss v. Nelson* (x), having occasion to speak of legacies, upon a note of hand, which he compared to the case of a legacy, he says, "But if the time is annexed to the substance of the gift, as a legacy, *if* or *when* he shall attain twenty-one, it will not vest before that contingency happens." He considered "when" precisely the same as "if."

Love v. L'Estrange (y) seems to have been considered a strong authority for holding "when" to operate conditionally. The late Lord

(u) 1 Eq. Ca. Abr. 195.

(x) 1 Burr. 226.

(y) 3 Bro. P. C. 337.

Chancellor was so strongly impressed with the idea he had thrown out at an early period in *Monkhouse v. Holme* (z), that he found it difficult to account for it otherwise than upon the distinction as to a residue; which the late Master of the Rolls in *Booth v. Booth* acknowledged there might be. But it was not necessary to resort to that; for *Love v. L'Estrange* may be warranted upon the principles laid down in *Goodtitle v. Whitby*. It was not a simple unqualified gift; but there were many circumstances to show that Walter Nash was meant to have the benefit absolutely, and that the enjoyment only was postponed; the testator giving it to trustees in the mean time, and applying a reason for withholding the enjoyment from this minor, that he wished him to follow his trade as a journeyman, with which object he naturally thought that fortune would interfere, and therefore he postpones the enjoyment of it until the age of twenty-four. But he gives it to trustees entirely and absolutely for the benefit of Walter Nash, to improve it for his benefit; to transfer the whole to him when he arrives at that age, and to make him a certain allowance in the mean time. That is very different from a simple bequest to him when twenty-four; for if that had been a legacy, it would have been separated from the residue immediately upon the testator's death, and must have been paid over to the trustees immediately, and they would have managed it until the legatee had attained the age of twenty-four.

Upon the whole view of the cases, and taking the reason of the doctrine, and the origin of it into consideration, there is no ground whatsoever for the generality of the proposition, which the Master of the Rolls is represented to have laid down in *May v. Wood*. To that proposition the following words are added: "and not, where he has merely used the word 'when,' for the sole purpose of postponing the time of payment."

If the Master of the Rolls meant so to qualify his former proposition, that I admit; and have no difficulty in agreeing to it. But it is evident that this is inaccurately taken; for the two parts of the proposition do not accord. First, it is laid down generally, that it requires words to show "when" does operate conditionally; in the latter part it is

stated, that if it appears "when" is used only for postponing payment, it shall not operate further. Nothing can be clearer than that.

In this cause, therefore, I should have determined against the plaintiffs, if it stood merely upon the first words. But then it is contended, that they are entitled, because interest is given; and that they come within an established rule of the Court; that, though such words are used as would not have vested the legacy, yet the circumstance of giving interest is an indication of intention, explanatory and denoting, that the testator meant the whole legacy to belong to the legatee. On the other side it was contended, that the interest is not so given as to bring it within the general rule, but what is given is more like maintenance. It is true it has been held, that has not the same effect as giving interest; upon this principle, that nothing more than a maintenance can be called for: what can be shown to be necessary for maintenance, however large the interest may be: and therefore what is not taken out of the fund for maintenance must follow the fate of the principal, whatever that may be. But by this will it is clear, the whole interest is given. Can there be any doubt, that in this case all the interest became, as it fell due, the absolute property of these infants, as separate altogether from the residue? All that is left to the trustees, is to determine in what manner it may be best employed. It is not merely so much of the interest as shall be necessary for the maintenance, but the interest entirely, separated from the principal. It is therefore the simple case of interest. It was observed for the defendants, that here is not only the period of the age, but also marriage with consent; and it was asked, supposing any of them had married without the consent of the executors, was it to vest? That is just the same question. If it is shifted to the question, whether it is to be paid, if any of them married without consent, the executors might say, no: the period of payment had not arrived. But marriage with consent is not a condition precedent, for at the age of twenty-one, whether married with consent or not, they would be entitled. That therefore, not operating as a condition precedent, does not make any material distinction. The legacy is accompanied with an absolute gift of the interest; which according to the established rule has the effect of vesting it. I am therefore of opinion, that the plaintiffs are entitled.

Boraston's Case, Pawlett v. Pawlett, Stapleton v. Cheales and Hanson v. Graham are printed together, because rules are there laid down, which are always referred to whenever the Courts have to determine the question, whether a devise or bequest is vested or contingent, than which, none of the numerous points arising out of the construction of instruments is perhaps more frequent or more difficult.

The result, moreover, of the question, whether a gift is vested or contingent is most important; because in the former case, although the devisee or legatee die before the event happens which gives him actual possession or enjoyment, the property devised or bequeathed becomes transmissible to his representatives; while, on the other hand, if the gift be contingent upon the happening of a certain event, which never takes place, the property will go to others.

Again, as we have before seen, where a gift vests within the period allowed by the rule against perpetuities it is immaterial that the possession or term of enjoyment is postponed beyond that period, otherwise it will be void. See ante, p. 380.

In general the Courts are in favour of a construction which gives a vested interest in property, as many inconveniences result from holding a gift to be contingent. The reasons for this inclination of the Courts have been well enunciated by Best, C. J.: "The rights," observed his Lordship, "of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience and sometimes of injury to them. If the parents' attaining a certain age be a condition precedent to the vesting of estates, by the death of their parents before they are of that age children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to. In consideration of these circumstances, the Judges, from the earliest times, were always inclined to decide that estates devised were vested; and it has long been an established rule, for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition, precedent to the vesting, is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstances occasioning the doubt; and what seems to make a condition is holden to have only the effect of postponing the right of possession." *Duffield v. Duffield*, 1 Dow & C. 311.

When a Devise of Real Estate is vested, and when contingent.

As a general rule where a devise is expressly made contingent upon a

certain event the Courts must follow the intention of the testator, and the gift will not take effect unless such event happens, although the consequences may be absurd (*Denn d. Radclyffe v. Bagshaw*, 6 T. R. 512; *Holmes v. Cradock*, 3 Ves. 317; *Parsons v. Parsons*, 5 Ves. 578; *Shuldham v. Smith*, 6 Dow. 22; *Dicken v. Clarke*, 2 Y. & Coll. Exch. Ca. 572; *Clarke v. Butler*, 13 Sim. 401; *Lenox v. Lenox*, 10 Sim. 400; *Vick v. Suster*, 3 Ell. & Black. 219), or although the testator by mistake may have supposed that he could only make a devise contingent upon the happening of the particular event (*Doe d. Vessey v. Wilkinson*, 2 T. R. 209): the Courts, however, will lean to a different construction in order to support the intention of the testator. *Bradford v. Foley*, Dougl. 63; *Quicks v. Leach*, 13 Mees. & W. 218.

Where an estate is once vested, it will not be divested unless the events upon which it is given over happen precisely in the manner mentioned by the testator. The leading case upon this subject is *Harrison v. Foreman*, 5 Ves. 207, there the testator bequeathed 40*l.* (part of certain annuities) to his cousin S. B. for her life, and after her decease to P. S. and S. S. in equal moieties, and in case of the decease of either of them in the lifetime of the said S. B., then he gave the whole thereof to the survivor of them living at her decease. P. S. and S. S. both died in the life of S. B.; it was held by Sir R. P. Arden, M. R., that the absolute gift to P. S. and S. S. was not divested as the contingency had not happened upon which the divesting was to take place. "It is perfectly clear," said his Honor, "that where there are clear words of gift, giving a vested interest to parties, the Court will never permit that absolute gift to be defeated, unless it is perfectly clear that the very case has happened in which it is declared that interest shall not arise. . . . There is a vested interest, and the contingency, upon which it is to be divested, never happened: the vested interest, therefore, remains, as if that contingency had never been annexed to it . . . I could illustrate the principle by putting the case of a real estate, instead of these annuities, given after the death of the tenant for life to these two persons and their heirs, as tenants in common; but, if either of them dies before the death of the tenant for life, then to the survivor and his heirs. Putting it so, there is no possibility of doubt, it would have been a vested interest in them, to be divested upon a contingency, which did not take place." The recent case of *Doe d. Blakiston v. Haslemood*, 10 C. B. 544, strongly exemplifies the strictness with which the rule laid down in *Harrison v. Foreman* is adhered to. There the testator, in contemplation that his death was approaching, devised lands to his wife for life, with remainder in fee to his nephew, with a condition, that if his wife should give birth to a *posthumous child*, such child should take to the exclusion of the nephew. A child being afterwards born in the testator's lifetime, it was held by the Court of Com-

mon Pleas, that such child did not take by implication under the will. "The will," said Williams, J., "contains a clear and unambiguous devise to the testator's nephew, subject to the previous estate for life given to the widow. The testator contemplates only one event which was to nullify the devise to his nephew, and that event has not happened; consequently the nephew takes the estate. It is said, that the testator could not have intended anything so monstrous, as that a child who might not happen to be posthumous should be disinherited in favour of a nephew. Perhaps not. In all probability the happening of such an event never occurred to him. Or, possibly, he intended to alter his will if he survived. I think we must adhere to the principle which has so long prevailed in wills, of collecting the intention of the testator from the language he has used; and, if we can only adhere to that principle by overruling *White v. Barber* (5 Burr. 2703), I, for one, am quite prepared to do so." See also *Sturgess v. Pearson*, 4 Madd. 411; *Clarke v. Lubbock*, 1 Y. & Coll. C. C. 492; *Eaton v. Barker*, 2 Coll. 124; *Wagstaff v. Crosby*, 2 Coll. 746; *Kimberley v. Tew*, 4 Dru. & Warr. 139; *Peters v. Dipple*, 12 Sim. 101; *Templeman v. Warrington*, 13 Sim. 267; *Belk v. Slack*, 1 Keen, 238; *Benn v. Dixon*, 16 Sim. 21; *Masters v. Scales*, 13 Beav. 60; *Gordon v. Hope*, 3 De G. & Sm. 351.

It may here be mentioned, that where a limited interest, as a life estate, is made to depend upon a contingency, such contingency will be extended to the subsequent limitations (*Davis v. Norton*, 2 P. Wms. 390; *Doe d. Watson v. Shipphard*, Dougl. 75; *Moody v. Walters*, 16 Ves. 283; *Toldervy v. Colt*, 1 Y. & Coll. Exch. Ca. 240, 627; 1 Mees. & W. 250), unless it be distinctly confined to the prior estate (*Horton v. Whittaker*, 1 T. R. 346; *Bradford v. Foley*, Dougl. 63; *Doe d. Lees v. Ford*, 23 L. J., Q. B., 53; and see *Napper v. Sanders*, Hutt. 118); or the subsequent limitations, instead of following immediately after the particular estate, stand by themselves without any connexion therewith. *Lethieullier v. Tracy*, 3 Atk. 774; Amb. 204; *Aislabie v. Rice*, 3 Madd. 256; 8 Taunt. 459; sed vide *Doe d. Vessey v. Wilkinson*, 2 T. R. 209.

As we have before seen, the ordinary inclination of the Courts is to construe gifts as vested, when they can do so without violating the express intention of the testator. Upon the subject of this proposition, it will be most convenient first to examine those cases where, although words of futurity are made use of, they are construed as manifesting the intention of the testator not to postpone the period of vesting, but that of possession or enjoyment.

In the case of a simple devise to B., whether it be or be not preceded by a previous life-interest given to some one else, if B. survive the testator, he acquires a vested interest, which becomes transmissible to his heir, although

in the latter case put, he may die during the existence of the previous tenancy for life.

Again, where an estate is limited over in default (*Doe v. Dacre*, 1 Bos. & Pul. 250; 8 T. R. 112; *Goodright v. Jones*, 1 Mau. & Sel. 88), or want (*Lewis v. Waters*, 6 East, 336) of issue or sons, the persons under the limitation over will take a vested remainder, although there may have been issue, or sons, who afterwards died; for the words "in default of issue or sons," will not be construed to mean *solely* if there be no issue or sons, but also to mean, if there be issue or sons and they shall die. See also *Ashley v. Ashley*, 6 Sim. 358. *Keene v. Dickson*, 1 Bos. & Pul. 254, n., is clearly overruled.

There is a somewhat similar class of cases, where there is a devise by the testator to his widow for life, with a limitation over if *she should marry again*, for in these cases it has been held, that the person entitled under limitation over, takes a vested remainder, to take effect either on the widow's second marriage or her death, and not merely a remainder contingent upon the widow's marrying again. Thus in *Luxford v. Cheeke*, 3 Lev. 125, John Church being seised in fee, and having four sons, Humphry, Robert, Anthony and John, made his will; and thereby devised his estate to his wife for life, *if she do not marry again, but if she do*, then that his son Humphry should, presently *after his mother's decease*, enter and enjoy the premises to him and the heirs male of his body, remainder to the testator's other sons, with remainders over. The testator died, the wife entered and died without having married again. It was held, notwithstanding the wife had never married again, that the heir was not entitled, but that a tenancy in tail male was created, for by the whole scope of the will it appeared plainly, the deviser intended an entail with several remainders over; and, rather than this intent should be defeated, the words should be taken and read thus, scil. if she marry, Humphry to enter presently; if she do not marry, then Humphry shall have, hold and enjoy them, to him and the heirs male of his body, with remainders over. See *S. C. nom. Brown v. Cutler*, T. Raym. 427; *Lady Fry's Case*, 1 Vent. 203; *Jordan v. Holkham*, Amb. 209; *Gordon v. Adolphus*, 3 Bro. P. C. 306, Toml. Ed.

In *Bainbridge v. Cream*, 16 Beav. 25, the testator bequeathed leaseholds to his wife for life, but if she married again then he revoked the gift; and from and immediately after the decease of his wife, or her second marriage, whichever event should first happen, the said testator gave and bequeathed a leasehold messuage to trustees upon trust to sell, and divide the proceeds amongst certain nephews and nieces (whom he named), as should be living at the decease of his wife. The wife married again. It was held by Sir J. Romilly, M. R., that the property thereupon became immediately divisible.

A strict construction will however be put upon words, when the testator's intent will not thereby be defeated; so that, in case the event upon which the gift over is to take effect does not happen in the precise mode pointed out, the gift over being construed as contingent, will thereupon fail. Thus in *Sheffield v. Lord Orrery*, 3 Atk. 282, the testator devised his house to his wife for life, upon this express condition only, "that if my said wife shall marry again, then my will and meaning is, that my said house shall go forthwith to my eldest son and his issue." It was held by Lord Hardwicke, C., that the limitation to the son was but a contingent remainder, and to take effect *only* on the widow's marrying again. His Lordship distinguished the case from *Luxford v. Cheeke*, and he observed, "That is the strongest case cited, but differs materially from the present. The penning is different; there after the devise are added these words, 'if she do not marry again,' which restrain the original limitation, and are the same as if they had been to the wife for life, if she so long continue a widow. There are no such words in the case at bar in the original limitation; but I do not lay much weight on this. The cases appear to me to differ in substance; there were no words in that will which could substantiate the testator's intent, without construing it an estate tail, otherwise the testator's intent would have been manifestly defeated: the Court therefore was constrained by necessity to make such a construction as would satisfy the testator's intent; for that is the very reason given by Mr. Justice Levinz. In the present case there is no such necessity for such a construction, for the subsequent words are sufficient to express his meaning; that after his son's death without leaving children it should go over; and the intent of the testator is more effectually answered by this construction than any other." See also *Amhurst v. Darnelly*, 8 Vin. Abr. 221, pl. 21; *S. C.* 5 Bro. P. C. 254, Toml. Ed., nom. *Amherst v. Lytton*.

Although it seems to be clear, that if property be given to a person, *if or when* he should attain a particular age, he will only take an interest contingent upon his arriving at that age; nevertheless, "where an absolute property is given, and a particular interest given in the mean time, as 'until the devisee shall come of age, and *when* he shall come of age, then to him,' &c., the rule is that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession. And to this purpose is *Boraston's Case* (3 Co. 21 a, b, ante, p. 653), where this doctrine is fully laid down and explained." Per Lord Mansfield, in *Goodtitle d. Haynard v. Whitby*, 1 Burr. 228. In other words, in such cases, by the construction adopted, the period of enjoyment alone is postponed, and the devisee takes a vested and transmissible interest, or a present right to future enjoyment. Thus in *Manfield v. Dugard*, 1 Eq. Ca. Abr. 194, pl. 4; *S. C.* Gilb. Eq. Rep. 36, a man devised certain lands to his wife, *till* his

son and heir apparent should attain to his age of twenty-one years, and *when* his son should attain to his age, *then* to his son and his heirs, and died. The son lived to the age of thirteen years, and then died, and the wife supposing that she had a title to hold the lands till such time as the son should have attained his age of twenty-one years, in case he had lived to that time, continued in the perception of the rents and profits of the lands for several years. And the bill was brought against her by the heir-at-law of the son, to have an account of the rents and profits from the death of the son; yet it not being devised during that time for payment of debts, nor any creditors, nor want of assets appearing; it was held by Lord Chancellor Cowper that the wife's estate determined by the death of the son, and that the remainder vested presently in the son, upon the testator's death, and was not expectant until the contingency of his attaining the age of twenty-one years should happen; for then in this case it never would have vested, he dying before that age, and he therefore decreed the wife to account for the profits from the time of the son's death; and upon a rehearing his Lordship continued of the same opinion, and grounded himself upon the distinctions taken in *Boraston's Case*.

Upon the same principle is the case of *Doe d. Wheedon v. Lea*, 3 T. R. 41. There the testator made a devise to trustees, their heirs and assigns *until Michael Lea should attain the age of twenty-four*, on condition that they should, out of the rents and profits during all that time, keep the buildings in repair; he then devised unto Michael Lea, and to his heirs and assigns for ever, *when and so soon as* he should attain his age of twenty-four, the premises in question. Michael Lea died under twenty-four intestate, and without issue; it was held by the Court of King's Bench, that Michael Lea took a vested interest which descended to his heirs. "The first case on this question," said Kenyon, C. J., "is *Boraston's Case*, in which case the words were '*when my son shall attain the age of twenty-one.*' There the Court held, that the remainder was executed in the son immediately after the death of the testator, and that it did not rest in contingency, and that the words '*then*' and '*when*' only denote the time when the remainder shall take effect in possession; for when these adverbs refer to a thing which must of necessity happen, there they make no contingency. The same doctrine is to be found in *Manfield v. Dugard* (1 Eq. Ca. Abr. 195), which case was directly similar to the present. The last case on this subject is that of *Goodtitle d. Hayward v. Whitby* (1 Burr. 228). That was a devise to trustees in trust to lay out the rents and profits of the devised premises for the maintenance and education of T. and J. Hayward (sons of the testator's sister), during their minorities, and *when and as* they should respectively attain their ages of twenty-one, then to the use of the said sons of his sister, and their heirs equally: one of the testator's nephews died under the age of twenty-one;

and the question was, whether, as he did not live till the time when the estate was to come into possession, it was a vested remainder? After argument the Court decided that it was; and Lord Mansfield recognized *Boraston's Case*, and the case of *Munfield v. Dugard*, adding, that these words could not operate as a condition precedent, but as giving an absolute interest in the fee, and denoting the time when the remainder was to take effect in possession; and that the devise to the trustees during the minorities of the nephews, was an exception out of the absolute property devised to them. These cases are not to be distinguished from the present." See also *Doe d. Morris v. Underdown*, Willes, 293; *Denn v. Satterthwaite*, 1 Wm. Black. 519; *Edwards v. Symons*, 6 Taunt. 213; *Goodright d. Revell v. Parker*, 1 Mau. & Sel. 692; *Warter v. Hutchinson*, 5 J. B. Moore, 143; 2 Brod. & Bing. 349; 3 D. & Ry. 58; 1 Barn. & Cress. 721; *Jackson v. Majoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 Sim. 48; *Parkin v. Knight*, 15 Sim. 83; *James v. Lord Wynford*, 1 Sm. & Giff. 40.

The words "from and after," will be construed in the same mode as "when" in *Boraston's Case*. *Doe d. Cadogan v. Ewart*, 7 Ad. & Ell. 636; 3 Nev. & P. 197.

Upon the same principle, words, by which, apparently, a gift over is made to depend upon a prior life interest taking effect, are frequently construed, as though not constituting a condition precedent, so as to render such gift contingent, but as only denoting the time when it is to vest in possession. Thus in *Pearsall v. Simpson*, 15 Ves. 29, a testatrix gave a sum to trustees for the separate use of her sister Mary Stafford for life, and after her decease to pay the principal sum among her children; and, in case there should be no child, to pay the interest to Richard Stafford (husband of Mary Stafford) during his life, and from and after his decease, *in case he should become entitled to such interest*, then in trust to pay the principal to his cousins in manner there mentioned. It was held by Sir W. Grant, M. R., that though Richard Stafford, having died during the life of his wife, never became entitled to any interest, the limitation over to the cousins was good. "The only question," said his Honor, "is, whether Richard Stafford's taking for life, was a condition precedent to the cousins of the testatrix taking the capital. That would be a most absurd condition undoubtedly; for there is no sense or reason, making the right of her first cousins depend upon a fact, totally unconnected with any intention as to them. What was it to them, whether Richard Stafford took or not? Such a construction is not to be made unless absolutely necessary. It is very different from the case put by Mr. Cooke—a case of direct condition,—that if A. lives to a particular period, he shall take, otherwise he shall not. It was doubtful whether Richard Stafford would live to become entitled to the

interest. The testatrix, giving the capital over after his death, recollects, that he may not live to take the interest; but if he does, she makes his death the period at which her first cousins are to take. It is, not a *condition precedent*, but *fixing the period* at which the legatees over shall take, *if he ever takes*. The words will bear that construction, and the reason of the thing seems to require it." See also *Webb v. Hearing*, Cro. Jac. 415; *Anon.*, 2 Vent. 363; *Massey v. Hudson*, 2 Mer. 130; *Franks v. Price*, 3 Beav. 182; 5 Bing. N. C. 37; 6 Scott, 710; *Wright v. Wright*, 21 L. J. Ch. 775; *Key v. Key*, 4 De Gex, Mac. & Gord. 73.

Although where there is a gift to a person *if* or *when* he should attain a particular age, the attainment of that age is a condition precedent, and he will not attain a vested interest until he attains such age; nevertheless, if it be followed by a limitation over, in the event of his dying under that age, it will be construed as a condition *subsequent*, and he will take a vested interest liable to be divested on his dying under that age. The leading case upon this point is *Edwards v. Hammond* (3 Lev. 132; also reported 1 Bos. & Pul. N. R. 324, n.), which gives the result of the search into the record of the case; there it appears that John Hammond the elder surrendered the reversion of some customary lands dependent on his mother's freebench, to the use of himself for life, and after his decease to the use of John Hammond the younger (his eldest son) "and his heirs and assigns for ever, *if it shall happen that the aforesaid John Hammond the younger shall live until the aforesaid John Hammond attain the age of twenty and one years*: Provided always and under condition nevertheless, *that if it shall happen that the aforesaid John Hammond shall die before he attain the age of twenty-one years*," then to remain to the use of John Hammond the elder and his heirs. It was held by the Court of Common Pleas, that though by the first words it might seem a condition precedent, yet, taking all the words together, it was not a condition precedent but a present devise to the eldest son, subject to and defeasible by this condition subsequent, viz. his not attaining the age of twenty-one. See also *Doe d. Hunt v. Moore*, 14 East, 601; *Doe d. Roake v. Nowell*, 1 Mau. & Sel. 327; 5 Dow, 202; *Doe d. Dolley v. Ward*, 9 Ad. & Ell. 582; 1 Per. & Dav. 568; *Greene v. Potter*, 2 Y. & Coll. C. C. 517.

In *Bromfield v. Crowder* (1 Bos. & Pul. N. R. 313), the testator devised his real estate to J. D. Bromfield immediately on the death of the preceding devisees, *if he should live to attain the age of twenty-one years*; but in case he should die before he attained that age, and his brother C. Bromfield should survive him, then he gave his real estate to C. Bromfield if he lived to attain twenty-one, but not otherwise. If both died under twenty-one, then he gave it to his godson J. Vale. It was held that J. D. Brom-

field took a vested estate in fee simple, determinable upon the contingency of his dying under the age of twenty-one years. "With respect to the cases," said Mansfield, C. J., "that of *Edwards v. Hammond* is on all fours with the present. The circumstance of the devise over being to a stranger makes no difference; for it is clear that the testator meant no one to take his estate unless in the event of the plaintiff dying under twenty-one. *Edwards v. Hammond* is neither opposed nor weakened by any case. No doubt the general meaning of the word 'if' implies a condition precedent, unless it be controlled by other words. But in this case there is a variance between the expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect to the latter." See also *Snow v. Poulden*, 1 Keen, 186.

The same construction will be adopted in the case of executory trusts (*Phipps v. Williams*, 5 Sim. 44; *S. C. nom. Phipps v. Ackers*, 9 C. & F. 583; *Stanley v. Stanley*, 16 Ves. 491), or where money is directed to be laid out in land. *Jackson v. Majoribanks*, 12 Sim. 93.

Where, however, there is a declaration that the devisee shall take a vested interest at (*Glanvill v. Glanvill*, 2 Mer. 38), or shall not take a vested interest until (*Russel v. Buchanan*, 7 Sim. 628; 2 Cr. & Mees. 561), a future period, in the former case by implication, in the latter by express terms, the gift is rendered contingent. See and consider *Bland v. Williams*, 3 My. & K. 411.

The principle, however, of *Boraston's Case*, will not be extended. In the class of cases indeed to which it belongs, we may observe that the devise is to an ascertained person at a given age, and the property is given over if he die under that age; and the Courts hold that the words accompanying the gift, though apparently importing a contingency or contingencies, do in reality only indicate certain circumstances, on the happening or not happening of which the estate previously vested should be divested, and pass from the devisee into some other channel. Where, however, the description of the devisee is such as to make the given age part of the description, there will be no gift to any person who does not answer the whole of that description. Thus, in *Bull v. Pritchard* (5 Hare, 567), the testator devised real estate upon trust for his daughter for her life, and from and after his decease to convey such estate unto and equally between and among *all and every the child and children of his daughter who should live to attain the age of twenty-three*, and their heirs and assigns for ever; and in case there should be no such child or children, or being such, all of them should die under twenty-three without issue, then over, with power to apply for maintenance the interest of such child's share, notwithstanding it should not be then absolutely vested. It was held by Sir James Wigram, V. C., that the limitation to the children of the testator's daughter

did not confer a vested interest, and that the limitations over in default of such children were void for remoteness. "There are two classes of cases," said his Honor, "under one or the other of which the present case must fall. One class is, where the devise is to a party at a given age, and the property is given over if the devisee dies under that age. The other is, where the description of the devisee is such as to make the given age part of that description. In cases of the former class the Court has discovered an intention expressed in the will, that the first devisee shall take all that the devisee has to give, except what he has given to the devisee over; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent but vested, subject to be divested upon the happening of the event upon which the property is given over (*Phipps v. Achers*, 9 C. & F. 583). In the second class the Court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required; that otherwise he did not answer the full description (*Festing v. Allen*, 12 Mees. & W. 279; *S. C.* 5 Hare, 573, and cases there referred to).

The question is, under which of these two classes does the present case fall? I think clearly under the second class. It is not necessary that I should say whether greater violence would be done to the language of the will in this case than was done in some of the cases of the first class,—as, for example, in the case of *Doe v. Moore* (14 East, 601). The two cases are, in principle, widely different from each other; and this case, in my opinion, clearly falls under the second class. Then does the clause as to maintenance, education and bringing-up alter the case? I think not. That such provisions are, in many cases, material upon the questions of vesting cannot be disputed; but there is nothing unreasonable or improbable in giving the benefit of maintenance, education and bringing-up to the devisee of the contingent interest. The question is, whether I can allow that clause to have any effect upon the description of the devisee, which description, without that provision, includes, as a part of it, the age of twenty-three years. I think not. The devise is not to the children *at or when or if*, but in effect to *such only as shall attain the age of twenty-three years*; and the interim gift has no legitimate bearing on the question." See also *Newman v. Newman*, 10 Sim. 51; *Duffield v. Duffield*, 1 Dow & C. 268; 3 Bligh, N. S., 260; *Wills v. Wills*, 1 Dru. & Warr. 439; sed vide *Doe d. Bills v. Hopkinson*, 5 Q. B. 223; *Riley v. Garnett*, 3 De G. & Sm. 629.

When Bequests of Personal Estate are vested, and when contingent.

Having examined this subject, so far as relates to devises of real property,

we next proceed to examine the authorities relating to the vesting of personal bequests.

A separate examination of the cases, where the subject-matter is thus different, is, if not absolutely necessary, at any rate convenient, inasmuch as the cases relating to the vesting of personal legacies (not charged on land) are to a great extent governed by the rules which our ecclesiastical courts have adopted from the Roman law, which, if they have not been entirely disregarded, have never been followed as precedents in determining questions of construction relative to devises of real estate.

As to Legacies payable out of Personal Property only.

The first general rule to be mentioned, and which is laid down in the principal case of *Stapleton v. Cheales*, is, 'that if a legacy be given to a person generally to be *paid* or *payable* at the age of twenty-one years, or any other age, or at any future certain and determinate time, the legatee will immediately on the testator's death have a vested interest transmissible to his executors or administrators, as being *debitum in presenti solvendum in futuro*. See *Jackson v. Jackson*, 1 Ves. 217; *Sydney v. Vaughan*, 2 Bro. P. C. 254, Toml. Ed.; *Wadley v. North*, 3 Ves. 364; *Bolger v. Mackell*, 5 Ves. 509; *Chaffers v. Abell*, 3 Jur. 577; and see *Lampen, v. Clowbery*, 2 Ch. Ca. 155; *In re Bartholomew*, 1 Mac. & G. 354.

The result is the same where there is a direction to *distribute*, as where there is a direction to *pay*, money. Thus in *May v. Wood*, 3 Bro. C. C. 471, where the testator bequeathed to his daughters, A. and B., the sum of 3,000*l.* 5*l.* per cent. Navy Annuities, and all dividends and proceeds arising therefrom to be equally divided between them when they should arrive at twenty-four years of age; it was held by Sir R. P. Arden, M. R., that the stock was vested immediately in the daughters.

It may here be mentioned that in these cases, unless interest were made payable on the legacy, upon the death of a legatee before attaining twenty-one, his representatives will not be entitled to call for payment until such period shall have elapsed as would have completed the majority of the legatee, though if the legacy carried interest they might at once call for payment. *Crickett v. Dolby*, 3 Ves. 13; and see *Feltham v. Feltham*, 2 P. Wms. 271; *Wadley v. North*, 3 Ves. 364.

The second rule of construction laid down in the principal case of *Stapleton v. Cheales* is that if a legacy be bequeathed to a person *at* twenty-one, or *if* or *when* he shall attain that age, or any other future certain and determinate period, the vesting of the legacy depends upon the legatee being alive at such period, and if he die before, it will not go to his personal represen-

tatives. See *Onslow v. South*, 1 Eq. Ca. Abr. 295, pl. 6; *Cruse v. Barley*, 3 P. Wms. 20; *Smell v. Dee*, 2 Salk. 415; *Atkinson v. Turner*, 2 Atk. 41; *Elton v. Elton*, 3 Atk. 504; *Leake v. Robinson*, 2 Mer. 363; *Ford v. Ramlins*, 1 S. & S. 328; *Murray v. Tancred*, 10 Sim. 465; *Mair v. Quilter*, 2 Y. & Coll. C. C. 465; *Boughton v. James*, 1 Coll. 26; *Bruce v. Charlton*, 13 Sim. 65; *Bromley v. Wright*, 7 Hare, 334; *Walker v. Mower*, 16 Beav. 365.

Both these rules, as is well shown by the examples given in *Hanson v. Graham* by Sir William Grant, M. R., have been borrowed from the Roman law, and are universally adopted, both by our Ecclesiastical Courts as well as our Courts of Equity; as, however, they yield to a clear contrary intention, it will be useful to consider them separately.

As to the first general rule, it must be observed, that it is liable to be controlled by the intention of the testator, if it *clearly* appears that he meant the vesting of the legacy to be postponed until the time of payment. Thus in *Knight v. Cameron*, 14 Ves. 389, the testator bequeathed 1,000*l.* to Frances Douglas, to be paid to her as soon as she should attain the age of twenty-one years, and in case she should live to attain that age and *not otherwise*, or upon her marriage, which should first happen: provided she should marry with the consent of his executors and *not otherwise*; but in case she died before she should have attained twenty-one, or be married with such consent, then over. It was held by Sir William Grant, M. R., that the legacy was not vested, and that the legatee, at least before payment, ought to predicate of herself, either that she had attained the age of twenty-one, or that she was married with consent. "It is impossible," said his Honor, "to say that this is not a condition precedent either to the payment or the vesting; and it is immaterial to which. I do not know how a condition precedent can be framed, if this is not one; "provided she should marry with the consent of his executors, and not otherwise." See also *Mackell v. Winter*, 3 Ves. 536; *Homes v. Herring*, 1 M'Clel. & Y. 295; *Hunter v. Judd*, 4 Sim. 455; *Lister v. Bradley*, 1 Hare, 10.

Upon the same principle, where a testator has shown a clear intention that a legacy should not vest until his debts are paid, his assets realized or lands sold or purchased, upon the death of the legatee before those events taking place, the legacy will not be transmissible to his representatives. *Small v. Wing*, 5 Bro. T. C: 66, Toml. Ed.; *Elwin v. Elwin*, 8 Ves. 547; *Bernard v. Montague*, 1 Mer. 422; *Law v. Thompson*, 4 Russ. 92). But unless the intention is *clearly* expressed the cases will fall under the general rule. *Hutchon v. Mannington*, 1 Ves. jun. 365; 4 Bro. C. C. 491, n.; *Gaskell v. Harman*, 6 Ves. 159; *Sitwell v. Bernard*, 6 Ves. 520; *Stuart v. Bruere*, 6 Ves. 529, n; *Entwistle v. Markland*, 6 Ves. 528, n.; *Wood v.*

Penoyre, 13 Ves. 325; *Whiting v. Force*, 2 Beav. 571; *Lucan v. Carline*, Ib. 367; *In re Dodgson*, 1 Drew. 440; and see *Tily v. Smith*, 1 Coll. 434.

The exception to the rule just alluded to has been objected to, on account of its leaving it in the power of trustees or executors to favour a particular class of persons, and of its making the vesting of the legacies depend upon their diligence in performing their duty. With regard to this objection it must be remarked, that the conduct of such persons will not be allowed to prejudice the legatees, the vesting of whose legacies will not depend upon the *actual* payment of debts, realization of assets or sale or purchase of lands, but upon the time when those acts ought to have been performed; and an inquiry will be directed in order to ascertain that time. See *Bernard v. Montague*, 1 Mer. 422, 431, 432, 433; and *Gaskell v. Harman*, 11 Ves. 507; where Lord Eldon says, "that no fraudulent or unnecessary dilatory dealing by trustees shall effect third persons."

Another objection to the exception is the inconvenience thrown upon the Court of ascertaining whether certain acts ought to have been performed by the trustees. This, as well as the former objection, is a good reason for confining the exception to cases where the testator's intention appears most clearly against the vesting of the legacies; but, without denying the inconveniences which exist in this view of the subject, it certainly would be a very strong proposition to say, either that a testator had no power to make such a provision, or (which is tantamount to such a declaration) that the Court will pay no regard to it when made. See *Bernard v. Montague*, 1 Mer. 431.

Another exception to the rule is, where the legacy is directed to be paid, upon an event about which there is an uncertainty as to its taking effect; for in this case, unless the event happens, the legacy being looked upon as conditional, will not vest or be transmissible to the personal representatives of the legatee. Thus in *Atkins v. Hiccocks* (1 Atk. 500), a testator bequeathed to his daughter 200*l.*, to be paid her at the time of, her marriage, or within three months after, provided she married with the approbation of his two sons. The daughter attained twenty-one, but died unmarried and intestate. Lord *Hardwicke*, C., held, that the legacy was not vested. "In the common cases of legacies," observed his Lordship, "to be paid at the age of twenty-one, there is a certain time fixed, not to the thing itself, but to the execution of it, and the time being so fixed must necessarily come; but when the time annexed to the payment is merely eventual, and may or may not come, and the person dies before the contingency happens, I can find no instance in this Court where it has been held that the legacy, at all events, should be paid. The rule as to the vesting is founded upon another rule *certum est quod certum reddi potest*, and it is plain that the testator did not regard the point of time, but the fact that was to happen—the marriage—which makes

it a legacy on condition, and it cannot be demanded till the condition be satisfied.

"It has been argued by Mr. Attorney-General, that this bequest differs not from a legacy given to *be paid at twenty-one*, which vests immediately, and the time of payment only is postponed. But it has been always held, with regard to such a limitation of payment at twenty-one, that it is *debitum in presenti, solvendum in futuro*, and the payment postponed merely on account of the legatee's legal incapacity of managing his own affairs till that age; and this has been the established rule of this Court ever since *Clobberie's Case* (2 Ventris, 342).

"In the Digest, lib. 35, tit. 1, lex 75, De conditionibus, &c., it is held, that *dies incertus conditionem in testamento facit*; and these are the words of the text and not of the commentator, so that a time absolutely uncertain is put on the same footing as a condition; but as the civil law is no further of authority, than as it has been received in England, let us see what our own authors say. *Swinbourn*, pt. 4, s. 17, p. 267, old edition, makes a difference between a certain and an uncertain time, and lays it down, that if a legacy is given to be paid at the day of marriage, and the legatee die before, the legacy is lost. Godolp. Orph. Leg. 452, is to the same effect." See also *Garbut v. Hilton*, 1 Atk. 381; *Elton v. Elton*, 3 Atk. 504; *Ellis v. Ellis*, 1 S. & L. 1.

With regard to the *second* rule, if a legacy be bequeathed to a person *at or if or when* he attains a certain age, the legacy will not vest, if he die before having done so, ante, p. 688; and the result will be the same, where there is a direction to pay and divide when persons attain twenty-one, because the gift being made to persons answering a particular description, if a party cannot bring himself within it, he is not entitled to take the benefit of the gift. Per Wigram, V. C., in *Packham v. Gregory*, 4 Hare, 398.

It is clear, however, upon the authorities, that the rule will yield to an intention appearing upon the will, requiring a different construction. For instance, as is laid down in the principal cases of *Stapleton v. Cheales*, and *Hanson v. Graham*, where a testator bequeaths a legacy to a person at a future time, and either gives him the *intermediate interest*, or *directs it to be applied for his benefit*; as the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should at all events have the principal, and on this ground (proceeding upon the same principle as in *Boraston's Case*), holds such a legacy to be vested (Fearn's Cont. Rem. 553, Butler's note). The cases upon this subject are fully examined in the principal case of *Hanson v. Graham*. See also *Lane v. Goudge*, 9 Ves. 225; *Love v. L'Estrange*, 5 Bro. P. C. 59, Toml. Ed.; *Vize v. Stoney*, 2 Dru. & Wals. 659; 1 Dru. & Warr. 337;

even, it seems, where the interest is only given for part of the period intervening before the time of payment (*Davies v. Fisher*, 5 Beav. 201; see also *Harrison v. Grimwood*, 12 Beav. 192; *Milroy v. Milroy*, 14 Sim. 48). But the exception is not applicable unless the whole amount of interest be given; as, for instance, if there be a mere allowance for maintenance out of the sum bequeathed (*Pulsford v. Hunter*, 3 Bro. C. C. 416; *Leake v. Robinson*, 2 Mer. 386, 387; *Vandry v. Geddes*, 1 Russ. & My. 203; *Lister v. Bradley*, 1 Hare, 10, 14); even although it be equal to the whole amount of the interest (*Livesey v. Livesey*, 3 Russ. 287; *Watson v. Hayes*, 5 My. & Cr. 125), unless the interest itself be given for maintenance. *Fonereau v. Fonereau*, 3 Atk. 645; *Hoath v. Hoath*, 2 Bro. C. C. 3.

If the gift of the capital and the interest are conferred by the same words, the gift of the interest does not vest the capital; if, for instance, there be a legacy to A. as soon as she attains twenty-one, *with interest* (*Knight v. Knight*, 2 S. & S. 490), and in order to make a legacy vested it is requisite that the intention should appear very clearly that the gift of the interest is not to be contingent. *Breedon v. Tugman*, 3 My. & K. 289; *Bull v. Johns*, Taml. 513; *Stretch v. Watkins*, 1 Madd. 253; *Oppenheim v. Henry*, 10 Hare, 441.

Although there is no gift, except in the direction to pay, or in the direction to pay and divide; if upon the whole will, it appears that the future gift is only postponed, to let in some other interest, or as the Court has commonly expressed it, for the benefit of the estate, the interest will be vested although the enjoyment is postponed (per Wigram, V. C., 4 Hare, 398). Thus in *Blamire v. Geldart*, 16 Ves. 314, where the testator gave to his nephew 200*l.*, 3*l.* per cent. Consols, at his wife's decease, and made her his residuary legatee. Sir W. Grant, M. R., was of opinion, that the will in effect gave a life interest to the wife, and the capital to the nephew at her decease, and the legacy to the nephew was vested immediately, and only the payment postponed. "This case," said his Honor, "appears to me not to be substantially distinguishable from those in which the words 'at' or 'after' the death of a particular person have been held, not to denote a condition that the legatee shall survive such person, but only to mark the time at which the legacy shall take effect in possession; that possession being deferred on account of some interest in the subject being given to the person on whose death the gift is to take effect. In *Medlicot v. Bowes* (1 Ves. 207), *Barnes v. Allen* (1 Bro. C. C. 181; 3 Ves. 208, n.), *Monkhouse v. Holmes* (1 Bro. C. C. 298), *Benyon v. Maddison* (2 Bro. C. C. 75), *The Attorney-General v. Crispin* (1 Bro. C. C. 386), and many others, the time might be said to be annexed to the substance of the gift just as much as in the present case; but the purpose being to give interests

to different persons in succession, it was held, that each gift was alike immediate; though the second taker could not have the benefit until after the death of the first." See also *Cousins v. Schroder*, 4 Sim. 23; *Parr v. Parr*, 1 My. & K. 647; *Bromley v. Wright*, 7 Hare, 334: sed vide *Davidson v. Proctor*, 19 L. J., Ch., 295; *Willis v. Plaskett*, 4 Beav. 208; *Chevaux v. Aistabie*, 13 Sim. 71; *Beck v. Burn*, 7 Beav. 492; and see the remarks on the last case in *Parker v. Sowerby*, 17 Jur. 752.

Where a fund is severed from the general estate immediately for the use and benefit of the legatee, and not only upon the happening of a particular event, it will be strongly in favour of vesting. Thus in *Saunders v. Vautier* (1 Cr. & Ph. 240), a testator by his will bequeathed to his executors and trustees all the India stock which should be standing in his name at his death, upon trust to accumulate the dividends until A. should attain twenty-five, and then to transfer the principal, together with such accumulations, to A., his executors, administrators or assigns. It was held by Lord Cottenham, C., that A. took an immediate vested interest in the legacy, although he was a minor at the testator's death; and payment of the stock and accumulations was decreed to be made to A. on his attaining twenty-one. "There is not only," said his Lordship, "the gift of the intermediate interest indicative, as Sir J. Leach observes in *Vandry v. Geddes* (1 Russ. & My. 203), of an intention to make an immediate gift, because for the purpose of the interest there must be an immediate separation of the legacy from the bulk of the estate, but a positive direction to separate the legacy from the estate and to hold it upon trust for the legatee when he shall attain twenty-five." See also *Greet v. Greet*, 5 Beav. 123; *Boddy v. Dawes*, 1 Keen, 362; *Lister v. Bradley*, 1 Hare, 10; *Festing v. Allen*, 5 Hare, 577.

It may be here mentioned, that although in those cases where interim interest is given it is presumed that the testator meant an immediate gift, because for the purpose of interest the particular legacy is to be immediately separated from the bulk of the property, the presumption fails entirely where the testator has expressly declared that the legacy is to go over, in case of the death of the legatee before a particular period. *Vandry v. Geddes*, 1 Russ. & My. 208; *Leake v. Robinson*, 2 Mer. 363.

Where a testator directs that a legacy is to vest at a particular period his directions will be obeyed (*Glanvill v. Glanvill*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 246); sometimes, however, the word "vest" is made use of in the same sense as "indefeazible," in which case it will merely have the same operation as that word. See *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Berkeley v. Swinburne*, 16 Sim. 275.

When a Gift of a Residue is vested or contingent.

It may here be remarked that there is a strong inclination in the Courts to consider a residuary bequest vested, inasmuch as the consequence of holding it to be contingent may possibly be that an intestacy would be occasioned. Thus in *Booth v. Booth* (4 Ves. 399) the testator gave the *residus* of his estate and effects to trustees, upon trust to get in and invest the same and to pay the dividends and produce thereof, as the same should from time to time become due, equally between his two greatnieces (who were both of age at the date of the will) until their respective marriages, and from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively. One of the legatees having died unmarried, it was held by Sir P. Arden, M. R., that her legacy nevertheless vested. "The general rule," said his Honor, "is, that an uncertain day of payment, or any circumstances that are to precede the payment of a legacy, will render it subject to a condition. I should be sorry to be supposed by any judgment of mine to break in upon it. The only question is, whether, upon the circumstance that this is the case of a residue, and the particular wording of this clause, this case is not made an exception to the rule, and is taken out of it. . . . That there is a difference between a bequest of a legacy and a residue with reference to this point cannot be denied, either upon principle or precedent. Every intendment is to be made against holding a man to die intestate who sits down to dispose of the residue of his property. How did this testator dispose of it? It might be supposed natural that they would marry. It might be his idea that there might be a possibility that they might not marry. If he did not mean by the residuary bequest to dispose of the absolute interest, it was natural that he should declare what should be the case if they should not marry. He has done that." See also *Jones v. Mackilwain*, 1 Russ. 220.

And where a vested interest in a residue is conferred in clear terms, it will not be rendered contingent by subsequent expressions of a doubtful character (*Dodson v. Hay*, 3 Bro. C. C. 404; *Montgomerie v. Woodley*, 5 Ves. 522; *Stretch v. Watkins*, 1 Madd. 252), though subsequent expressions, showing a clear intention on the testator's part that a residuary devise or bequest of property should not confer a vested interest, will control former expressions where the intention in favour of vesting is doubtful. *Judd v. Judd*, 3 Sim. 525. See also and consider *Walker v. Mower*, 16 Beav. 365; *King v. Isaacson*, 17 Jur. 434; 22 Law J., Chanc., 455; *Bree v. Perfect*, 1 Coll. 128; *Eccles v. Birkett*, 4 De G. & Sm. 105; *Barker v. Sowerby*, 1 Drew. 496.

When the attainment of a particular age is made part of the description of the objects, as where there is a bequest of a residue to such children *who*,

or *as shall*, attain a particular age, the legacy is contingent upon the happening of that event (see *Bull v. Pritchard*, 1 Russ. 213; *Newman v. Newman*, 10 Sim. 51; *Boreham v. Bignall*, 8 Hare, 131); but the construction will be different if the contingency be not contained in the bequest itself (*Bradley v. Barlow*, 5 Hare, 589), or, if being so, the bequest is to a class *when and as* they attain a particular age. *Harrison v. Grimwood*, 12 Beav. 198; sed vide *Vandry v. Geddes*, 1 Russ. & My. 208.

As to the effect of a gift over in conferring a vested interest, see *Bland v. Williams*, 3 My. & K. 411; *Davies v. Fisher*, 5 Beav. 201; *Harrison v. Grimwood*, 12 Beav. 192; *Bree v. Perfect*, 1 Coll. 128.

As to Legacies payable out of Real Estates only.

"The rule," says a learned writer, "adopted in respect to legacies payable out of personal estate, that, when the gift and the time of payment are distinct, the legacy vests immediately, does not hold generally in regard to legacies charged on real estate. The reason of this distinction is, that, in the civil law, a bequest to a person to be paid at a future time was held to confer on him a present right to the legacy, notwithstanding the time of payment was future; so that immediately on the testator's decease it became, in the eye of the civil law, a present debt payable at a future time, *debitum in presenti, solvendum in futuro*. Now, anciently, legatory matters arising on personal estate, were solely under the jurisdiction of the Ecclesiastical Courts, and the decisions of those Courts were regulated by the civil law. By degrees Courts of Equity took cognizance of them, and, with a view to uniformity of decision, adopted the rule in question in respect to such legacies. But legacies out of real estate never fell within the cognizance of the Ecclesiastical Courts; there was not, therefore, the same reason for applying this rule to that description of legacies; and, as it appeared contrary to the favour which the law shows to the owner of the inheritance, Courts of Equity rejected it as a general rule, in respect to all such legacies. *Poulet v. Poulet*, or *Pawlett v. Pawlett* (2 Vent. 306; 1 Vern. 204, 321), is generally referred to as a leading case establishing this distinction." Note by Mr. Butler to Fearn's Contingent Remainders, 555.

With regard to legacies charged on real estates, for the reasons before mentioned, it has become a general rule, that legacies payable at a future time,—whether, by the language of the bequest, the time is annexed to the substance or to the payment of the legacy, as a bequest to a person of a sum of money at twenty-one, or a bequest to a person of a sum of money payable to him at twenty-one,—equally sink into the land for the benefit of the inheritance, if the legatee die under twenty-one. (Ib.)

The rule of law laid down in the principal case of *Pawlett v. Pawlett* (where, it must be observed, the portion was charged upon the land by deed) has been adopted in a numerous series of cases, and has been extended to legacies given by will, not merely to children as portions, but to strangers. *Smith v. Smith*, 2 Vern. 92; *Yates v. Phettiplace*, 2 Vern. 416; *S. C. Prec. Ch.* 140; *Jennings v. Looks*, 2 P. Wms. 276; *Duke of Chandos v. Talbot*, 2 P. Wms. 610; *Prowse v. Abingdon*, 1 Atk. 485; *Reynish v. Martin*, 3 Atk. 335; *Harrison v. Naylor*, 3 Bro. C. C. 108; nor will the gift of interest until the legacy become payable, take a case out of the general rule. *Gawler v. Standerwick*, 2 Cox, 15; *S. C.* 1 Bro. C. C. 106, n.

An extensive exception to this rule has arisen, from a distinction which has been taken as to the apparent motives for the postponement of legacies, and the time for their payment is made to depend, not as in the cases falling under the general rule, upon events personal to the legatee, but for the convenience of the estate. This distinction, now well established, though undoubtedly a very refined one, is well explained by Mr. Butler in his learned note to Fearn's Contingent Remainders, p. 556, who observes, that "when a legacy is bequeathed to a child on his attaining twenty-one or marrying, or on any other event *personal* to him, the legacy is evidently postponed to the time specified, from its being considered that the legatee will then want the benefit of the legacy; but, when the estate is devised to a person for life, and after his decease is charged with a legacy, the legacy is evidently postponed till the decease of the devisee for life, from its being incompatible with his life estate that it should be raised in his lifetime. The payment of the legacy is therefore considered to be postponed, in the first case, from regard to *circumstances personal* to the legatee; and, in the second, from regard to the *circumstances of the estate*: and it has been inferred, that in cases of the first description, the testator does not intend the legatee shall receive the legacy, unless the circumstance happens on which the testator made it payable; and that in cases of the second description, the testator intends the legatee shall receive it at all events. In the former cases, therefore, it has been held that, if the legatee dies while the time of payment is in suspense, the legacy sinks into the land for the benefit of the inheritance; and in the latter cases it has been held, that if the legatee dies during the continuance of the preceding estate or interest, his personal representatives will be entitled, on its determination, to have the legacy raised for their benefit."

The case of *King v. Withers* (Ca. t. Talb. 117; 3 P. Wms. 414; Prec. Ch. 348) is the leading case which proceeded on this distinction. There the testator bequeathed to his daughter *Mary*, at twenty-one or

marriage, 2,500*l.*, declaring that if his son *Charles* should die without issue male *then* living, or which might afterwards be born, *Mary* should receive an additional sum of 3,500*l.* at twenty-one or marriage. But if the contingency of his son's death did not happen before *Mary* attained twenty-one or married, *she was to be paid the 3,500*l.* whenever his son died.* The testator then devised his real estate to his son in tail, remainder to his brother in fee; and *charged* that estate with the payment of the 3,500*l.*, "whenever it should become due and payable," directing, in case of failure of issue of his son, that *Mary*, her heirs or assigns, should join in a surrender of some copyholds to his brother, or the bequest of the 3,500*l.* was to be void. *Mary* married, and, *having attained twenty-one, died before her brother*, who also died without male issue, and the 3,500*l.* was claimed by her administrator. The question was, whether the money was to be raised out of the land, the personal estate being deficient? which depended upon this,—whether such an interest in it vested in *Mary* as to be transmissible to her personal representative, although she died before the period when it was made payable? And Lord Talbot decreed in the affirmative.

With reference to *King v. Withers*, Lord Hardwicke says that it was the first case where a legacy was determined to be vested, though charged upon land, *on circumstances arising from convenience to the estate*; as Lord Talbot was of opinion that the legacy should be raised, the time of payment being postponed *for the convenience of the estate* (3 Atk. 321). It has been followed by a long series of decisions. See *Hutchins v. Foy*, Com. Rep. 716, 723; *Lowther v. Condon*, 2 Atk. 127; *Emes v. Hancock*, 2 Atk. 507; *Sherman v. Collins*, 3 Atk. 319; *Hodgson v. Rawson*, 1 Ves. 44; *Tunstall v. Brachen*, Amb. 167; 1 Bro. C. C. 124, n.; *Embrey v. Martin*, Amb. 230; *Manning v. Herbert*, Amb. 575; *Jeal v. Tichener*, 1 Bro. C. C. 120, n.; Amb. 703; *Clark v. Ross*, 2 Dick. 529; 1 Bro. C. C. 120, n.; *Kemp v. Davy*, 1 Bro. C. C. 120, n.; *Panssey v. Edgar*, 1 Bro. C. C. 192, n.; *Thompson v. Dow*, 1 Bro. C. C. 193, n.; *Morgan v. Gardiner*, 1 Bro. C. C. 194, n.; *Dawson v. Killet*, 1 Bro. C. C. 119; *Walker v. Main*, 1 J. & W. 1; *Poole v. Terry*, 4 Sim. 294; *Murkin v. Phillipson*, 3 My. & K. 257; *Goulbourn v. Brooks*, 2 Y. & Coll. Exch. Ca. 539.

Another exception to the general rule is where the testator directs that the legacy should vest on his death. Thus in *Watkins v. Cheek* (2 S. & S. 199) a testator bequeathed legacies to his two daughters, charged on his real estate, the "*same to vest in them immediately upon his death*," but to be paid on their attaining their ages of twenty-one years, and the interest thereof, in the mean time, to be applied by his executrix in their maintenance

and education. The testator's daughters died infants. It was argued that the two daughters having died before their ages of twenty-one, when the legacies were made payable, the legacies as against the real estate must sink for the benefit of the devisee. Sir John Leach however held, that the testator, by the direction in question, meant to express that the legacies should not sink for the benefit of the devisee of the land if the daughters should die under twenty-one. As applied to the personal estate the direction was wholly inoperative. Without this direction the legacies, from the form of the gift, would have been payable out of the personal estate if the legatees had died under twenty-one. And, as applied to the real estate, the direction did not seem capable of any other meaning than that the legacies should not fail by the death of the legatees before the time of payment.

As to Legacies charged on a mixed Fund, that is to say both on Real and Personal Estate.

Where legacies are charged on a mixed fund of realty and personalty, in the absence of the testator's intention to the contrary, the personal estate is considered as the primary fund, and the real estate the auxiliary fund for their payment. It has been laid down that, so far as the personal estate will extend to pay such legacies, the case as to vesting is governed by the same rules as if the legacies were payable out of personal estate only; and so far as the real estate must be resorted to for their payment the case is governed by the same rules as if they were charged on the real estate only. Thus in *The Duke of Chandos v. Talbot* (2 P. Wms. 601, 612), Sir T. Doleman bequeathed to his nephew Lewis 500*l.*, payable at the age of twenty-five. He also devised his real estates to trustees, charged with the payment of debts and legacies. Lewis, having survived the testator, died at the age of sixteen. The personal estate being insufficient, an attempt was made to resort to the real estate; but Lord King held, that so much of the legacy as the personal estate was sufficient to answer vested in the legatee, and was transmissible to his personal representative, but that the remainder of the legacy with which it was sought to affect the real estate failed by the death of Lewis under twenty-five. "The authorities," observed his Lordship, "show there is no difference when the real as well as the personal estate is charged; for in such case, as far as the executor or administrator claims out of the latter, he shall succeed according to the rule of that Court where these things are determinable, even though the infant legatee dies before the time of payment; but as far as the legacy is charged upon the land so far shall it, on the legatee's dying before the legacy becomes payable, sink. And this being the rule which has of late so universally prevailed, be the legatee a

child or stranger, it would be of the most dangerous consequence, and disturb a great deal of property, for him to break into it." This decision was followed by Lord Hardwicke in *Prowse v. Abingdon* (1 Atk. 481), his Lordship however remarked, that it "was a difficulty which always stuck with him, and it was something very extraordinary, that the real estate, which was only an auxiliary fund to the personal, should in cases of this kind be chargeable in a different manner, and not be made liable to the same rules and determinations with the primary security—the personal estate; but he said he found the resolutions so strong, that there was no difference between a charge on the real estate only, and a charge on the real and personal estate too, that he could not, at that time of day, think of determining in a different manner." 1 Atk. 485.

LEVENTHORPE *v.* ASHBIE (*a*).*Mich. 10 Car., Rot. 120.*

[REPORTED ROLLE'S ABRIDGMENT, 831, pl. 1.]

WORDS CONFERRING AN ESTATE TAIL IN REAL, GIVE AN ABSOLUTE INTEREST IN PERSONAL, ESTATE.]—*A. devises a term of years to B. and the heirs male of his body begotten :—Held that B. was absolutely entitled to the term, and that on his death it went to his executors.*

SI A. possesse d'un term pur ans, ceo devise al B. et *al heires males de son corps engendres*, et puis B. morust sans issue male, deins le term, uncore son executors averont le residue del terme, et nemy l'executors del A., car ceo est un void limitation del grant a limiter al B. et heires males de son corps, car son heir male de son corps ne puissoit ceo aver sil ust ewe ascun issue male, mes son executors, pur ceo que *un entaile ne poet estre d'un terme*, et donque ceo est un devise del terme absolument sans ascun limitation, et issint l'executors del devisee ceo averont, et la ne serra ascun reverter al executors del A. le devisor sur mort del devisee sans issue male. P. 11 Car. B. R. enter Leventhorpe et Ashbie, resolve per Curiam sur evidence al bar. Et ils nolent ceo suffer d'estre trove specialment pur le cleerenes, pur ceo que ils disoient que ad estre issint adjudge divers temps. Intratur Mich., 10 Car., Rot. 120, sur le volunt de Thomas Leventhorpe.

In accordance with *Leventhorpe v. Ashbie*, cited by Fearn as a leading case upon the subject (1 Fearn, C. R. 460), it has long since been established, that chattels, whether real or personal, bequeathed to a person in such terms

(*a*) *S. C. D'Anvers*, Ab. vol. 2, p. 521, pl. 1.

as would, in the case of an estate of inheritance, have conferred upon him an estate tail will, as a general rule (subject to some exceptions which will be hereafter noticed), give him an absolute interest, which on his death will go, not to his heir in tail, but to his personal representative. Thus a bequest to A. and the heirs of his body (*Attorney-General v. Gill*, 2 P. Wms. 368; *Attorney-General v. Hird*, 1 Bro. C. C. 170; *Crawford v. Trotter*, 4 Madd. 361), or, as in the principal case to A. and the heirs male of his body (*Seale v. Seale*, 1 P. Wms. 290; *Fordyce v. Ford*, 2 Ves. jun. 536; *Montague v. Bealieu*, 3 Bro. P. C. 277, Toml. Ed.), would give A. an absolute interest in the property.

So a bequest to A. and his issue, if he have none then living, will give him an absolute interest (see note to *Wylde's Case*, ante p. 545). The same result will follow, where there is a bequest to several persons and their issue (*Parkin v. Knight*, 15 Sim. 83), and where, in such a case, there was a gift over in the event of any or either of them dying without issue lawfully begotten *living at the time of his or their respective deaths*, of the share of him or them so dying, to the survivors or survivor equally, and to the issue of their several and respective bodies lawfully begotten, it was held, that the parents took absolute interests, with benefit of survivorship, in case any or either of them died without issue living at their deaths respectively. *Lyon v. Mitchell*, 1 Madd. 467; sed vide *Lampley v. Blower*, 3 Atk. 397.

Where there is a bequest to a man and his issue, and he has issue at the time, it seems that the parent and issue will take concurrently. *Clay v. Pennington*, 7 Sim. 370; and see ante, p. 545; sed vide *Lampley v. Blower*, 3 Atk. 397.

And with the exceptions which have been before noticed (see *Forth v. Chapman*, and note ante, p. 556), although an attempt has been made to restrain the rule to those cases, where there has been a limitation in words which would create an *express* estate tail in realty (*Atkinson v. Hutchinson*, 3 P. Wms. 259; *Doe v. Lyde*, 1 T. R. 596), it also extends to limitations by which an estate tail in realty would be conferred by *implication*. Thus if personal estate be bequeathed to A. generally, to A. for life, or to A., his executors and administrators, and if he die without heirs of his body, or without issue, the legatee will take an absolute interest, *Bigg v. Bensley*, 1 Bro. C. C. 187; *Bodens v. Watson*, Amb. 398, 478; *Windham v. Love*, 2 Ch. Rep. 14; 1 Lev. 290; *Campbell v. Harding*, 2 Russ. & My. 390; *Dunk v. Fenner*, 2 Russ. & My. 557; *Simmons v. Simmons*, 8 Sim. 22; *Caulfield v. Maguire*, 2 J. & L. 176; and see *Chandless v. Price*, 3 Ves. 102.

And where a bequest of personalty is made in terms which in the case of realty would, according to the rule in *Shelley's Case*, give an estate tail to

the ancestor, it will confer upon him an absolute interest. Thus if real and personal property be given to A. for life, and after his decease to the heirs of his body, A. will take an estate tail in the real estate, but he will be entitled to the personal estate absolutely. See *Butterfield v. Butterfield*, 1 Ves. 133, 153; *Garth v. Baldwin*, 2 Ves. 646; *Tothill v. Pitt*, 1 Madd. 488; *S. C. nom. Earl of Chatham v. Tothill*, 7 Bro. P. C. 453, Toml. Ed.; *Earl of Verulam v. Bathurst*, 7 Jur. 295. The result is the same where the bequest is made by reference to limitations of real estate. *Brouncker v. Bagot*, 1 Mer. 271; 19 Ves. 574; *Douglas v. Congreve*, 1 Beav. 159.

And it seems, that notwithstanding the cases of *Jacobs v. Amyatt* (4 Bro. C. C. 542), and *Wilson v. Vansittart* (Amb. 562), in which it was held, that words of distribution annexed to a limitation of the heirs of the body, after a previous life interest given to the ancestor, would prevent him taking an absolute interest, yet as Lord Thurlow decided the former of those cases, in opposition to *King v. Burchell* (Amb. 379; 1 Eden, 425), and as in *Doe v. Applin* (4 T. R. 82), (the doctrine of which has since been affirmed, see ante, p. 496), it was held, that similar words did not prevent the operation of the rule in *Shelley's Case*, we may conclude, that at the present day such words would not prevent the ancestor taking an absolute interest. See *Jesson v. Wright*, 2 Bligh, 1.

And, as in the case of realty, superadded words of limitation will not cut down the absolute interest of the parent to an estate for life. *Congreve v. Douglas*, 1 Beav. 59, ante, p. 492.

But the words "heirs of the body," may be so explained by the context, as to have the meaning of the word "children," in which case, as in the case of realty, the parent will only take for life, and the children as purchasers. *Symers v. Jobson*, 16 Sim. 267.

It seems that although the devise of an express estate for life to the ancestor, followed by a gift to his issue, would in the case of realty confer an estate tail upon the parent, in the case of personalty he will only take an estate for life. This was determined in the leading case of *Knight v. Ellis*, 2 Bro. C. C. 570. There the testator directed his trustees to permit and suffer his grandnephew, on attaining twenty-one, to receive and take the interest of certain trust monies *during his natural life*, and after his decease he gave the said monies to *the issue male of his said grandnephew*, with a limitation over in default of such issue. It was held by Lord Chancellor Thurlow, that the grandnephew took only a life interest, and having died without issue, who would have taken as purchasers, the limitation over took effect. "I observe," said his Lordship, "that in a book of great character, I mean Mr. Fearn's Essay on the learning of the contingent remainders, after citing and discussing

all the cases on this head in the Court of Chancery, he concludes by laying it down as the rule of this Court, that it will go every length possible to carry the intention of the testator into execution for the benefit of those to whom the testator designed a benefit. It must have occurred to the Judges who have decided those cases, that under the idea of making the rules of decision as to leasehold estates analogous to those which are applied to estates of inheritance, the intention of the testator must be much oftener disappointed than carried into effect, and then there is no wonder that the Court should try to get out of the technical rule by any means that it can. Now what do the cases come to? A man by his will devises to A. for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A., and any other gift would be effectual after his death. The testator then gives the same fund over to B. after failure of issue of A. What is the Court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B. while there is any issue of A. The consequence is, that as no interest springs to B. and no express estate is given after the death of A., the intermediate interest would be undisposed of, unless A. were considered as taking for the benefit of his issue as well as himself; and as the words in this case are capable of such amplification, the Court naturally implies an intention in the testator that A. should so take, that the property might be transmissible through him to his issue, and he was therefore considered as taking an estate tail which would descend on his issue. Now an estate in chattels is not transmissible to the issue in the same manner as a real estate, nor capable of any kind of descent, and therefore an estate in chattels so given, from the necessity of the thing, gives the whole interest to the first taker; but if the testator, without leaving it to the necessary implication, gives the fund expressly to the issue, they are not driven to the former rule, but the issue may take as purchasers, and then there is an end of the enlargement, of any kind, of the estate of the tenant for life; for another estate is given, after his death, to other persons, who are to take by purchase: it no longer rests in conjecture. The word "*issue*," used in a will, certainly is considered as creating an estate tail, and that because the context puts on the word an import which it has not naturally; but in a feoffment it is not a word of inheritance, and a gift to A. and the issue of his body gives only an estate for life. On the whole I think that the issue, if any, would have taken as purchasers, and that, in the event that has happened of there being no issue, the other limitation to the plaintiff took place."

The authority of *Knight v. Ellis*, was opposed by *Attorney-General v. Bright*, 2 Keen, 57; and *Harvey v. Foxell*, 7 Hare, 231; but it has been recently followed by the Lords Justices of the Court of Appeal, in the case of *Wynche's Trust*, 23 L. J., Ch., 930; see also *Hall v. Nalder*, 22 L. J.,

Ch., 242; 17 Jur. 224; *Heather v. Winder*, 5 L. J. (N. S.) Ch., 41; *Stonor v. Curween*, 5 Sim. 264.

So, likewise, the words "child" or "children," as well as the word "issue" will not be construed as words of limitation, as they might be in the case of real estate, as the effect would be to cause a failure of the intention of the testator by defeating a limitation over. *Stone v. Maule*, 2 Sim. 490; *Malcolm v. Taylor*, 2 Russ. & My. 416; *sed vide Scott v. Scott*, 15 Sim. 47.

As to gifts to issue by way of substitution. See *Pearson v. Stephen*, 2 D. & Cl. 328; 5 Bligh, N. S. 203; *Price v. Lockley*, 6 Beav. 180; *Gibbs v. Tait*, 8 Sim. 132; *Dick v. Lacy*, 8 Beav. 214; and see and consider *Butter v. Ommaney*, 4 Russ. 70; see *Forth v. Chapman* and note ante, p. 556; and the distinction there laid down between the effect of a devise of realty and a bequest of personalty, in the event of a person dying without leaving issue.

Although a limitation over after an absolute interest in personalty is void, it should be remembered that this is only the case, where a person comes into existence who can take such absolute interest. Thus if leaseholds be given to A. for life, with remainder to his first and other sons in tail male, with remainders over, if A. have a son an absolute interest will vest in him, and the gift over will be void; but if he have no son, the gift over will take effect. See *Pelham v. Gregory*, 3 Bro. P. C. 204, Toml. Ed.; *Sabbarton v. Sabbarton*, Ca. t. Talb. 55, 245; *Gower v. Grosvenor*, Barn. C. C. 54; *Phipps v. Lord Mulgrave*, 3 Ves. 613; *Boydell v. Golightly*, 14 Sim. 327; overruling *Brett v. Sanbridge*, 3 Bro. P. C. 141, Toml. Ed.

The construction, however, of wills coming under the operation of 1 Vict. c. 26, s. 29, will be materially altered by the restriction placed upon words formerly denoting a general failure of issue, which will now be construed as meaning the failure of issue at the death. See ante, p. 525.

As to chattels settled, or directed to be settled, by reference to limitations of real estate in strict settlement, see note to *Lord Glenorchy v. Bosville*, 1 L. Cas. Eq. 28.

JONES v. WESTCOMB (a).

De Termino S. Mich., Oct. 31, 1711.

[REPORTED PREC. CH. 316.]

A. devised a term for years to his wife for life, and after her death to the child she was then enceinte with; but if such child died before twenty-one, then he devised one-third part of the said term to his wife, whom he made executrix. The wife not being enceinte at the time of the devise:—Held, 1st, that the devise to her was good, though the contingency never happened; 2ndly, that she should have the undisposed of surplus of the personal estate, which was not to go in a course of administration.

THIS was a case wherein my Lord Keeper took time to consider, before he would give his judgment, and was this:—

A man, possessed of a long term for years, by his will devised it to his wife for life, and after her death to the child she was then *enceinte* with; and if such child died before it came to the age of twenty-one, then he devised one-third part of the said term to his wife, her executors and administrators, and the other two-thirds to other persons, and made his wife executrix of his will, and died.

This bill was brought against her by the next of kin of the testator, to have an account and distribution of the surplus of his estate, not devised by his will. And two questions were made; 1st, whether the devise to the wife of one-third part of the term were good, because it happened she was not then *enceinte* at all; and so the contingency upon which the devise to her was to take place never happened.

(a) *S. C. Gilb. Rep.* 74; *1 Eq. Cas. Abr.* 245, pl. 10.

The other question was, whether this term being part of the personal estate, and expressly devised to her for life, with such other contingent interest on the death of the supposed *enceinte* child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix, and so the surplus go in a course of administration, to be distributed amongst the plaintiffs as next of kin.

Lord Keeper Harcourt, as to the first point, now delivered his opinion, that though the wife was not *enceinte* at the time of the will, yet the devise to her of such third part of the term was good.

And, as to the other point, dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part as aforesaid.

"A question," says Lord Mansfield, "was pleaded in the days of ancient Rome, by *Scævola* and *Crassus*, in the famous cause between *Curius* and *Coponius*; and much agitated in modern times, in the Courts of Westminster Hall, in the case of *Jones v. Westcomb*. A man taking for granted that his wife was with child, devised his estate to the child his wife was *enceinte* of; and if such child died under age, then he devised it over. The woman was *not* with child, and the question was, whether the devisee over should take. The Roman tribunals at once (*Oratio pro Cæcina*), and the English at last, finally determined, that the intent though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was entitled." 3 Burr. 1623.

The principal case according to the allusion of Lord Mansfield, C. J., was at one time the subject of much discussion, and the Court of Common Pleas (see *Roe d. Fulham v. Wickett*, Willes, 303, 311), on the same will came to a different conclusion to that arrived at by Lord Harcourt; the Court of King's Bench, however, on two occasions agreed with him. See *Andrews v. Fulham*, 2 Stra. 1092; *Gulliver v. Wickett*, 1 Wils. 105. See the account given by Lord Mansfield, of the litigation respecting the point decided in the principal case. 3 Burr. 1624.

The principle established by *Jones v. Westcomb* is, that an ulterior, executory or substituted gift, to arise upon the failure of a prior interest,

may take effect, although the mode in which that event has happened has not been precisely provided for by the testator, the foundation for such principle being, that by necessary implication it must be considered that it was the testator's intention that the ulterior gift should take effect, in *all* events, upon the failure of the prior one, he not making the failure in a particular mode a condition precedent.

This principle was acted upon in *Statham v. Bell*, Cowp. 40, where the testator who had one daughter, after reciting that his wife was then pregnant, if she brought forth a son willed that he should inherit his estate at twenty-one, but if it should be a daughter, he gave one moiety to his wife, and the other to his two daughters to be divided between them at the age of twenty-one. If either died before that time, the survivor to have her sister's share. If both died before that time, he gave both their shares to his wife and her heirs. The wife was not enceinte, and the daughter died under twenty-one without issue. It was held by the Court of King's Bench, that the wife was entitled to the whole estate. See also *Foster v. Cook*, 3 Bro. C. C. 347; *Fonereau v. Fonereau*, 3 Atk. 315; *Meadows v. Parry*, 1 V. & B. 124; *Earl of Newburgh v. Eyre*, 4 Russ. 454.

Upon the same principle a limitation over, in the event of a testator having only one child, may take effect although there be no child; thus in *Murray v. Jones*, 3 V. & B. 318, the testatrix after giving her residuary personal estate to her daughters and younger sons, and if there should be an eldest or only son and but one daughter or younger son, then the whole to such one daughter or younger son at twenty-one; but in case she should have but one child living at the time of her decease, be the same a son or a daughter, or in case she should have two or more sons and no daughters or daughter living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, or in case she should have two or more daughters and no son or sons living at the time of her decease, and all of them but one should depart this life under the age of twenty-one years, and without having been married, or in case she should have both sons and daughters and all but one being a son should die under twenty-one years, or, being a daughter, should die under that age and unmarried, then, in any of the said cases, she directed her trustees to stand possessed of the said residue, upon trusts in favour of M. and her issue. The testatrix never had a child. Sir W. Grant, M. R., held; that the limitation over took effect. "In my opinion," said his Honour, "the first case put by the testatrix, namely, that of her having but one child living at her death, does not contain a condition, that she should have one child living at that time. At first sight, a proposition relative to the having but one child may seem to include in it, and to imply, the having one. That is true, if the proposition be

affirmative, but by no means necessarily so, if the proposition be hypothetical or conditional. The proposition, that A. has but one child, is as much an assertion that he has one, as that he has no more than one; but when the having but one is made the condition on which some particular consequence is to depend, the existence of one is not required for the fulfilment of the condition; unless the consequence be relative to that one supposed child. As if I say, that in case I have but one child, it shall have a certain portion, it is, in the nature of the thing necessary, that the child should exist, to be entitled to the portion; but if I say, that in case I shall have but one child of my own, I will make a provision for the children of my brother, it is quite clear, that my having one child is no part of the condition, on which the supposed consequence is to depend. My having one child of my own, would rather be an obstacle than an inducement to the making of a provision for the children of another person. The case I guard against is the having a plurality of children, and it is only the existence of two or more that can constitute a failure of the condition on which the intended provision for my brother's children was to depend. The plain sense of the proposition is, that unless I have more than one the provision shall be made." Animadverting on the supposed conditional words, "but in case," his Honour added, "It is clear, that the testatrix was not here prescribing substantive conditions, in the proper sense of the word, on which the original devise should depend; but was specifying events, in which the former limitation would fail; and an opening would be made for that which was to be substituted in its place. It is true that the testatrix has not specified all the modes in which the preceding limitation might fail; as it might, not only by there being but one child, but also by there being no children ever born. Then it falls precisely within *Jones v. Westcomb*. The limitation over depends on the failure of that which precedes it; but the testatrix has not taken in all modes, by which it might fail. In *Jones v. Westcomb*, the only specified case of failure was by the death of the supposed child under twenty-one; the actual failure was by the non-existence of any such child. I do not see how these cases can be distinguished."

So, likewise, in *Mackinnon v. Sewell*, 2 My. & K. 202, where the testatrix bequeathed her residuary personal estate to trustees for her daughter Caroline for life, and after her decease to her (the testatrix's) granddaughter Lydia for life if she should survive her mother and live to attain the age of twenty-one, and in case she should not survive her mother and live to attain the age of twenty-one years, then to such other child or children of the testatrix's daughter Caroline as should be living at the time of her decease; and if all such other children should happen to die before the age of twenty-one, then in trust for the testatrix's daughter Louisa. Caroline survived her

daughter Lydia, and her only other child attained twenty-one but died in her lifetime. It was held by Lord Chancellor Brougham, affirming the decision of Sir L. Shadwell, V. C. (5 Sim. 78), that on the death of Caroline, leaving no children, the bequest over to Louisa took effect. "It is argued," said his Lordship, "that the intention was effectually fulfilled by taking the words as words of limitation, upon the authority of that class of cases of which *Jones v. Westcomb* is the leading, though certainly not the strongest or the most remarkable, decision. . . . It seems to me abundantly manifest that the present case comes within that class of authorities, and is untouched by the others; always assuming that the words are to be taken, as I have shown they must be, to import a dying under age of all the children of Caroline who survive their mother. For this is, in effect, a gift upon the failure of any child to survive Caroline and reach majority; and that failure has happened, or, rather, more has happened, because none have survived at all, much less have any both survived and reached twenty-one. The class of children whose dying under age forms the condition, never existed, and nothing turned upon their existing. The gift over was defeated if any surviving child attained twenty-one, but no surviving child existed; just as in the leading case the executory limitation was defeated, if the child in *ventre sa mère* reached twenty-one, and there was no other child in *esse*. If, indeed, as was said in another of the cases, anything had turned on the circumstance of there being surviving children of Caroline, the reasoning would have failed; the contingency would have become affirmative; the condition not being capable of being read as we have read it, would not have been fulfilled by the event; and the gift limited upon that condition would have been defeated. The result of the reasoning, therefore, is, that both propositions appear to be established: first, that the words, "all such other children" in the statement of the contingency, mean all the children who survive their mother; and, secondly, that the clause so construed is an executory limitation which takes effect, although there be no children to answer the description by surviving their mother."

Upon the same principle, where there is an executory gift over, in the event of a prior object of the gift not performing a certain act, such executory gift over will take effect, although the object of the first gift never came into existence. Thus in *Scatterwood v. Edge*, 1 Salk. 229, where the testator made a devise to trustees for eleven years, and then to the first and other sons of A. in tail male, with a proviso, that the said sons of A. should take on them his surname; and in case they refused to do so, or died without issue, then he devised the land to the first son of B. in tail. A. had no son at the time of the devise, and died without issue. It was held by the Court

of Common Pleas, that the devise to the first son of A. was not a precedent condition, but a precedent estate attended with limitations, and consequently that B.'s son was entitled to take under the gift over. See also *Avelyn v. Ward*, 1 Ves. 420; *Doe d. Wells v. Scott*, 3 Mau. & Sel. 300.

Where, however, the prior gift fails, not by reason of its object never having come into existence, but by reason of a lapse in consequence of the death of the object to whom an absolute interest is given, during the life of the testator, the principle upon which *Jones v. Westcomb* was decided will not be applicable, and consequently the gift over will not take effect. See *Calthorpe v. Gough*, 3 Bro. C. C. 395, n.; *Doo v. Brabant*, Ib. 393; 4 T. R. 706; *Williams v. Chitty*, 3 Ves. 545; *Miller v. Faure*, 1 Ves. 85; *Humberstone v. Stanton*, 1 V. & B. 385; *Williams v. Jones*, 1 Russ. 517; *Lomas v. Wright*, 2 My. & K. 775.

In *Tarbuch v. Tarbuch*, 4 L. J. (N. S.), Ch., 129, a testator devised an estate to his son James for life, with remainder unto and equally amongst all the children of his son James, and to their respective heirs as tenants in common. He devised another estate to his son Jonathan and his children in the same terms; and in case his son James died without leaving lawful issue, he gave the estate so previously devised to James unto Jonathan and his heirs, and made a similar devise *mutatis mutandis*, if Jonathan died without leaving lawful issue; but, if both his sons should die without leaving lawful issue, then he gave the estates to his nephews and nieces as tenants in common in fee. The testator's son James alone had issue a son, and both the sons of the testator, and also the son of James died in the lifetime of the testator. It was held by Sir C. Pepys, M. R., that the gift over to the nephews and nieces did not take effect. "I am of opinion," said his Honor, "that if James and Jonathan had survived the testator they would have taken estates for life, with remainder to their children in fee, but with executory devises over, in the event of their leaving no children at the times of the death of the respective tenants for life; and if this be the true construction of the devise, it is clear the gift to the nephews and nieces could never have taken effect, for that gift is only to take effect in the event of James and Jonathan dying without lawful issue, that is children to the above construction, and James, at the time of his death, had a son, namely, James, who survived both his father and his uncle Jonathan.

The only remaining question is, whether the circumstance of James and his son, and Jonathan, having died in the testator's lifetime makes any difference. The distinction is very nice between those cases, in which executory limitations have been held not to be defeated by the failure of a prior estate, as in *Avelyn v. Ward* (1 Ves. 420); *Jones v. Westcomb* (ante, p. 705); *Murray v. Jones* (3 V. & B. 318), and the opposite class

of cases, in which it has been held, that subsequent limitations do not arise, although the preceding estates fail, because the event in which the estate was to go over had not arisen. The principle, however, is well established, although there has sometimes been some confusion in the application of it. It is, as I conceive, clear, that if James and Jonathan had survived the testator, the devise to the nephews and nieces could not have taken effect under the circumstances which happened; and it is, I think, established by authority, that the situation of the parties is not altered by their having died before the testator; *Williams v. Chitty* (3 Ves. 545), *Calthorpe v. Gough* (3 Bro. C. C. 395, n.), *Doo v. Brabant* (Ib. 4 T. R. 706), and *Hum-berstone v. Stanton* (1 V. & B. 385), are decided cases on this point. I am therefore of opinion, that the event on which the nephews and nieces were to take did not happen, and that consequently there is an intestacy." See also *Jackson v. Noble*, 2 Keen, 590.

MORLEY v. BIRD.

Rolls, March 1st and 5th, 1798.

[REPORTED 3 VES. 629.]

JOINT-TENANCY—TENANCY IN COMMON.]—*Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction; as in partnerships, joint mortgages, &c.*

Specific legacy of stock decreed according to the value at the time it ought to have been transferred.

WILLIAM COLLINS, by his will, gave to his daughter Elizabeth all his freehold houses and lands at Newbury and Bath, and Weston, with all his money in the stocks, mortgages, debts, &c., goods, chattels, "and everything I die possessed of, I give this all to her only use and pleasure for ever, on condition that she do pay to the four daughters of my brother John Collins four hundred pounds, out of seven now lying in the 3l. per cent. Consolidated."

Three of the four daughters of John Collins died in the life of the testator. The surviving daughter Martha, in 1790, married Thomas Morley. The testator died on the 1st of June, 1793. The bill was filed in June, 1797, by Morley and his wife against William Bird and Elizabeth his wife, the testator's daughter, claiming the whole legacy given to the four daughters of John Collins.

The defendants by their answer stated, that the defendant Elizabeth having been advised that the plaintiff Martha was only entitled to

100*l.* of the said 700*l.*, 3*l.* per cent. Annuities, the defendant Elizabeth from time to time caused to be transferred 600*l.* of such annuities, leaving 100*l.* to answer the plaintiff's legacy, and which the defendant offered to transfer, and to permit the plaintiffs to receive the dividends accrued subsequent to the testator's death.

Sir R. P. Arden, M. R.—The only point is, whether this legacy is to be considered as a joint legacy given to the four daughters of Collins as joint-tenants, or whether they were to take 100*l.* each as tenants in common. The first question is, whether the form in which this legacy is given makes any difference from what would be the case if it was a direct legacy to be paid by the executor. That was contended to take it out of the common case, supposing a joint legacy can take place, that not being a legacy to be paid by the executor, but payable upon a condition, if it is not to be done according to the terms it is void; and if so, three being dead, and the condition therefore having become impossible, it proves totally void, and would absolve the devisee from the payment of any sum. It is impossible to make the least distinction between a legacy to one person upon condition to pay to four persons 400*l.*, and a legacy of 400*l.* to be paid to them by the executor.

The next question is, whether, according to the rules of this Court, a legacy of a gross sum given to two or more without any words of severance or distribution, is a gift in joint-tenancy to the persons intended to be benefited. That came before me in *Campbell v. Campbell* (4 Bro. C. C. 15), where the first question was, whether there were sufficient words of severance to make a legacy a tenancy in common, supposing there could in point of the rules of construction be any such thing as a joint legacy; and I was pressed with *Perkins v. Baynton* (1 Bro. C. C. 118), in which it was said Lord Thurlow had expressed a doubt, whether a legacy is a subject upon which a joint-tenancy can attach. I remember taking much time, and fully inquiring whether there was any foundation for that doubt; and the result of that inquiry led me to think the report of *Perkins v. Baynton* must have been mistaken; and I took notice that it was not the point before Lord Thurlow, for the question there was merely whether there was a severance or not.

As the opinions of great Judges given upon points not before them have certainly not so much weight as when the points are before them, I should on that account have paid the less regard to it; but if I was satisfied that Lord Thurlow really doubted the point, even though it was not before him, I should have much questioned my own opinion; but I rested my opinion in *Campbell v. Campbell* upon *Cray v. Willis* (2 P. Wms. 529), which I still conceive a direct authority by a very great Judge, Sir Joseph Jekyll, upon all questions of this nature. He seems to consider that both residuary and pecuniary legatees must be taken to be joint-tenants, unless there are words of severance showing an intention to make a tenancy in common; and I cannot suppose Lord Thurlow threw out that doubt; but I am relieved from difficulty by subsequent cases before Lord Thurlow, in which he makes no such doubt. In *Jolliffe v. East* (3 Bro. C. C. 25), he throws out no such doubt; on the contrary, he expressly gives his opinion there, that it is a joint-tenancy or a tenancy in common, according as there are words of severance or not. The pains he there takes would have been thrown away if he had any such doubt. He had the question before him, whether the legacy of 10,000*l.* was a joint-tenancy or a tenancy in common; and there is not the least hint of his having doubted whether the subject was capable of a joint-tenancy; and therefore I believe he never entertained such a doubt.

Then the question is, whether, if the manner in which this legacy is given makes no difference, which it is impossible to suppose, this legacy, without any words which can in any degree be construed a severance, is not a joint interest; and the consequence is, that it is a gift to all or to the survivor, as at law; and the deaths of the three will not vitiate the gift.

I wish to give my opinion very explicitly. Great doubts have been entertained by Judges, both at law and in equity, as to words creating a joint-tenancy or a tenancy in common; and it is clear, the ancient law was in favour of a joint-tenancy; and that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint-tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common. A legacy of a specific chattel, a grant of an estate, is a joint-tenancy. It is true, the Courts seeing the in-

convenience of that, have been desirous, wherever they could find any intention of severance, to avail themselves of it : and their successive determinations have laid hold of any words for that purpose. "Equally to be divided (a)," "equally, among, between," even in law I believe, certainly in equity, create a tenancy in common ; but without those words it is a joint-tenancy. But many distinctions have been raised in equity (b) ; as where persons are in trade, and have joint debts due to them ; the Courts say, it could not be intended to the prejudice of the family of the deceased partner ; therefore, not doubting that it would be a joint-tenancy at law, in equity they say it could not be the agreement. So if two people join in lending money upon a mortgage, equity says it could not be the intention that the interest in that should survive. Though they take a joint security, each means to lend his own and take back his own. But that was never extended to grants. A voluntary bond would survive, if no intention of the party to make a severance appears. Therefore legacies, gifts, grants, &c., are both at law and in equity joint ; except from the nature of the contract, or from the words, some intention of severance appears.

This is a legacy to four persons, and there are no words of severance ; therefore it is a joint legacy ; and the whole interest survives to the survivor, three being dead ; and though I agree with those who think it the least evil that it should be a tenancy in common, this is one of those cases in which it is more convenient that it should remain joint. Sir Joseph Jekyll, in *Cray v. Willis*, observes the convenience that a joint-tenancy sometimes has ; that the legacy is not lost. This legacy, therefore, belongs to the plaintiffs (c).

It was then contended that this was a specific legacy, and the plaintiffs were entitled to the value of the 300*l.* stock at the end of a year from the testator's death.

The Master of the Rolls was of opinion, upon reading the will, that it was specific ; observing, that on that account it was more clearly a joint-tenancy ; and upon the 8th of March declared, as to the 300*l.*, that the plaintiffs were entitled according to the value of the stock at the

(a) *Rigden v. Vallier*, 2 Ves. 252.

(b) 1 Ves. jun. 434, 435 ; 2 Ves. 258.

(c) See *Stuart v. Bruce*, 3 Ves. 632.

end of a year from the death of the testator, when it ought to have been transferred; and directed an inquiry to ascertain the value at that time; and that the remaining 100*l.* should be transferred with the dividends accrued.

In the principal case, Sir R. P. Arden, M. R., enters into the law relating to joint interests, and lays down some very important propositions, which have been approved of and followed by subsequent Judges.

As distinguished from a sole or several interest in property, which is enjoyed by a single individual, and who is said to hold in severalty, joint estates, or interests in property have been divided into four kinds: I. An estate in parcenary; II. An estate in joint-tenancy; III. A tenancy in common; IV. Tenancy by entireties.

I. An Estate in Parcenary.

Parceners are of two kinds—Parceners according to the course of common law, and parceners according to custom. Litt. s. 241.

Parceners at common law are females, or heirs of females, who succeed upon an intestacy of the person seised of an inheritance, there being no nearer heir male. Thus, for instance, if a person dies leaving two or more daughters, but no son, such daughters will take their father's inheritance as parceners (Litt. ss. 241, 254). So if his sisters or aunts are his next heirs, they will take as parceners. Ib. s. 242.

Although parceners have a joint seisin as regards strangers, they have a several seisin as between themselves, and each may be said to be seised of a distinct moiety. Hence, on the death of a parcener intestate, her share does not survive to the others, but will descend to her heirs (whether they be her own issue or her coparceners, if she have no issue Litt. s. 280), and will be subject to her husband's curtesy, and both the heir and the husband will hold the land in coparcenary. Co. Litt. 174 b.

Where, however, a parcener aliens or devises her estate, the tenancy is destroyed, and the devisee or alienee will hold his share as a tenant in common (Co. Litt. 174 b, 175 a); the other coparceners will however still continue to hold their shares in coparcenary. Ib. 175 b.

Parceners make but one heir to their ancestor (Litt. sect. 241), and it will

be observed, that they always take by *descent*, hence if two sisters purchase lands or tenements, they will either be joint-tenants or tenants in common, as the case may be, but not parceners. Litt. s. 254.

Parceners may effect a voluntary partition of their estate, but a deed is now necessary for that purpose (8 & 9 Vict. c. 106, s. 3), and formerly any one of them might compulsorily have obtained a partition at common law by means of the writ *De partitione faciendâ* (Litt. s. 247); but as it has been recently abolished (3 & 4 Will. 4, c. 27, s. 36), that object can now be only attained by means of a commission, issued by the Court of Chancery, which had indeed previously almost superseded the writ *De partitione faciendâ*. See Co. Litt. 169 a, n. 2, vii.; *Agar v. Fairfax*, 2 L. Cas. Eq. 329, and note.

After partition each of the persons, who were formerly parceners, holds his share in severalty, and continues entitled by *descent*, and not by *purchase*. 2 Prest. Abr. 72; *Doe d. Crosthwaite v. Dixon*, 5 Ad. & Ell. 834.

Parceners by custom are to be seen where a person dies intestate seised of gavelkind lands in the county of Kent, as these descend to all the sons equally by custom. Litt. s. 265.

II. *Estates in Joint-Tenancy.*

A joint-tenancy (which is always created by *purchase*) is where property is conveyed, devised or bequeathed to persons jointly, either for-lives, *pour autre vie*, or in fee (Litt. s. 277; Co. Litt. 180 b). Each joint-tenant is seised of the whole and every part, or, as it is termed in old Norman French, *per my et per tout*.

There may also be a joint-tenancy in chattels, both real and personal. For, according to the example put by Littleton, "if a lease of lands or tenements be made to many for term of years, he which survives of the leasees shall have the tenements to him only during the term by force of the same lease. And if a horse or any other chattel personal be given to many, he which surviveth shall have the horse only." Litt. s. 281.

In order to create a joint-tenancy, the interest of each must be the same; it must arise under the same instrument, commence at the same time, and be held by one and the same undivided possession, or, as it has sometimes been laid down, there must be—1. Unity of interest; 2. Unity of title; 3. Unity of time; 4. Unity of possession. 2 Cruise, Dig. tit. 18, c. 1, s. 11.

1. There must be unity of interest, thus if a man demises lands to two, to have and to hold to the one for *life*, and to the other for years, they are not joint-tenants; for a state of freehold cannot stand in joint-tenancy with a term of years (Co. Litt. 188 a), neither can a reversion upon a

freehold be held in joint-tenancy with a freehold and inheritance in possession. *Ib.*; *Litt. s. 302*.

Upon the same principle, there can be no joint-tenancy between parties some of whom hold in a natural, and the others in a corporate or politic, capacity, and the parties, as hereinafter is more fully shown, will be tenants in common. *Post*, p. 727.

2. With regard to unity of title. The estate of joint-tenants must be created by the same act or instrument, whether legal or illegal; as by one and the same feoffment, grant, fine, or other conveyance or assurance, or by one and the same disseisin; for a joint-tenancy cannot arise by descent or act of law, as has been already observed, but only by purchase or acquisition of the party. 2 *Cruise*, Dig. tit. 18, c. 1, s. 16.

3. As to unity of time. The estate must, with the exceptions hereinafter mentioned, become vested in all the joint-tenants at the same time. Thus if lands be demised for life, with remainder to the right heirs of I. S. and I. N., and I. S. has issue and dies, and afterwards I. N. has issue and dies, the heirs of I. S. and I. N. are not joint-tenants, because the one moiety vested at one time, and the other moiety vested at another time. *Co. Litt. 188 a*.

Under the Statute of Uses, however, persons may take as joint-tenants at different times. Thus if a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry, for the term of their lives, they are joint-tenants, although they come to their estates at several times. *Co. Litt. 188 a*; *Blamford v. Blamford*, 3 *Bulst.* 101; *Sussex v. Temple*, 1 *Ld. Raym.* 310; *ante*, p. 262.

4. As to unity of possession. As we have before seen, joint-tenants are seised per my et per tout; or, in other words, each of them has the entire possession of every part as well as of the whole (2 *Cruise*, Dig. tit. 18, c. 1, s. 26). Formerly the possession and seisin of one coparcener, joint-tenant or tenant in common was deemed the possession and seisin of the others. The law, however, upon this subject has been altered by 3 & 4 *Will. 4*, c. 27, which enacts, "that where any one or more of several persons entitled to any land or rent as coparceners, joint-tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them. *Sec. 12*."

The main feature distinguishing a joint-tenancy from a tenancy in common and parcenary is the *jus accrescendi* or survivorship which takes place on the death of a joint-tenant. To use the words of Littleton, "if three joint-

tenants be in fee simple, and one hath issue and dieth, yet they which survive shall have the whole tenements, and the issue shall have nothing. And if the second joint-tenant hath issue and die, yet the third, which surviveth, shall have the whole tenements to him and to his heirs for ever." Litt. s. 280.

If land be conveyed to two persons without making mention of what estate they are to have, they take as joint-tenants for their lives; that is to say, during their joint lives, each of them will be entitled to a moiety of the rents, and on the death of one of them the other will be entitled to the whole of the rent by survivorship. Litt. s. 283.

There may be also joint-tenants who have a joint estate for the term of their lives, and yet have several inheritances. Thus if lands be given to persons incapable of marrying, as to two men and the heirs of their two bodies begotten, in this case the donees have a joint estate for the term of their two lives, and yet they have several inheritances; for if one of the donees has issue and dies, the other will take the whole by survivorship for the term of his life; and if the survivor has also issue and dies, then the issue of the one will take one moiety, and the issue of the other will take the other moiety of the land, and they will hold the land as tenants in common and not as joint-tenants (Litt. s. 283). The reason why the issue will take several inheritances, Littleton says, is this,—“inasmuch as the joint-tenants for life cannot, by any possibility, have an heir between them ingendered, as a man and a woman may, the law will that their estate and inheritance be such as is reasonable, according to the form and effect of the words of the gift, and this is to the heirs which the one shall beget of his body by any of his wives, and to the heirs which the other shall beget of his body by any of his wives; and so it behoveth by necessity of reason that they have several inheritances” (Ib.). “And in this case,” Littleton adds, “if the issue of one of the donees after the death of the donees die, so that he hath no issue alive of his body begotten, then the donor or his heir may enter into the moiety as his reversion, although the other hath issue alive; and the reason is, forasmuch as the inheritances be several, the reversion of them in law is several, and the survivor of the issue of the other shall hold no place to have the whole.” Ib.

If, however, the lands had been given to a man and woman either already married or capable of intermarriage, and the heirs of their two bodies, then they will take an estate in special tail, and during their joint lives, each will be entitled to a moiety of the rents and profits, and the survivor will be entitled to the whole during his or her life; and upon his or her decease, the heir of their bodies will be entitled by descent. Co. Litt. 20 b, 25 b; Bac. Abr. tit. “Joint Tenants (G).”

Upon the death of a joint-tenant, the estate will not be liable either to curtesy or dower. Co. Litt. 30 a, 183 a; Litt. s. 45; Co. Litt. 37 b.

And in accordance with the maxim, "*jus accrescendi preferatur oneribus*," a rentcharge granted by a joint-tenant will not be binding upon the survivor (Litt. s. 286); and formerly, the result was the same, in case a recognizance, statute or judgment was entered up against a joint-tenant, who died before execution. Co. Litt. 184 a; *Lord Abergavenny's Case*, 6 Co. 78.

The law, however, is now altered, and the creditor will not be deprived of the benefit of his judgment in cases of joint-tenancy, by reason of the death of the debtor in the lifetime of his co-tenant, and before the execution of the *elegit*, but will be entitled to the same remedies against the share which has survived, as he would have had in the lifetime of the debtor. *Prideaux, Judgments*, 66, 4th Ed.

If a joint-tenant be indebted to the crown, after his death no extent can be made upon the land in the hands of the survivor. Co. Litt. 185 a.

A lease, however, by a joint-tenant will be binding upon the survivor. Co. Litt. 185 a; *Whitlock v. Huntwell*, 2 Roll. Abr. 89; 2 Cruise, Dig. tit. 18, c. 1, ss. 57, 58.

Trustees are always made joint-tenants, so that the estate may go to the survivor unaffected by any testamentary disposition of any deceased trustee.

The trust estate will, however, pass by the will of the surviving trustee, or, if he does not dispose thereof, will descend upon his heir, and the devisee or heir will remain a trustee until there has been a new appointment of trustees and a conveyance of the trust estate to them in the usual manner.

What Words will give a Joint-Tenancy by Deed.

As a general rule, as is laid down in the principal case, the ancient law being in favour of a joint-tenancy, where there is a grant of an estate to two or more persons (except husband and wife), without any words of severance, they will take as joint-tenants; whether it be *pur autre vie*, for their own lives, or in fee. 4 Cruise, Dig. tit. 32, s. 43.

Where a person conveyed his house and four farms to trustees, upon trust that his sisters might cohabit in the capital house, *and equally divide the rents and profits of four farms betwixt them, and the whole to the survivor of them*; it was held that they took a joint estate, and not a tenancy in common; "for," it was said by the Court, "although the words 'equally to be divided betwixt them' sometimes in a will may make a tenancy in common only by way of construction, and that it was the intent of the testator that there should be a division in partition; yet, if afterwards in the will it is

declared, as in this case, it should go to the survivor, that would oust such construction, and it would be a joint estate, even in the case of a devise by will." *Clerk v. Clerk*, 2 Vern. 323; and see *Ward v. Everet*, 1 Ld. Raym. 422; *Stratton v. Best*, 2 Bro. C. C. 233.

Upon the same principle, where two or more persons either take a conveyance of (*Taylor v. Fleming*, cited Freem. Ch. Rep. by Hovend. 23; *Rigden v. Vallier*, 3 Atk. 735; *S. C.* 2 Ves. 253; *Rea v. Williams*, Sugd. V. & P., Append., No. xxi., 11th Edit.) or contract to purchase (*Aveling v. Knipe*, 19 Ves. 441) lands to themselves and their heirs, if they have paid or contracted to pay the purchase-money in equal shares; in the first case the survivor will be entitled to the estate, in the second to the benefit of the contract (*Dart. V. & P.* 482; 1 L. Cas. Eq. 125, note to *Lake v. Craddock*): but where the purchase-money is advanced in unequal proportions Courts of Equity, which always lean against a joint-tenancy, will hold the survivor to be a trustee for the other in proportion to the sum advanced by him. *Ib.*

Again, although persons advancing money upon a mortgage jointly, are at law considered to be joint-tenants, in equity whatever may be the proportions in which they advanced the money, they will be tenants in common (*Ib.* 126); and if joint mortgagees foreclose they will in equity be considered as tenants in common. *Ib.*

Another important exception from the general rule is that made in favour of merchants according to the maxim, "*Jus accrescendi inter mercatores locum non habet*;" for, as Coke observes, "the wares, merchandizes, debts or duties, that persons have as joint merchants or partners shall not survive, but shall go to the executors of him that deceaseth; and this is per legem mercatoriam, which is part of the laws of this realm for the advancement and continuance of commerce and trade, which is *pro bono publico*." *Co. Litt.* 182 a.

The same result will follow where persons purchase real property for a joint undertaking or partnership in trade, or in any other dealing. See *Jeffereys v. Small*, 1 Vern. 217; *Jackson v. Jackson*, 9 Ves. 596; *Elliot v. Brown*, 9 Ves. 597, cited; *Lyster v. Dolland*, 1 Ves. jun. 431; 1 L. Cas. Eq. 128.

It must however be remembered, that where real estate is purchased with *partnership capital*, for the purposes of *partnership in trade*, it will, in the absence of any express agreement, be considered as absolutely converted into personalty; and, upon the death of one of the partners, his share will not go to his heir-at-law, or be liable to dower, but will belong to his personal representatives. 1 L. Cas. Eq. 130; *Phillips v. Phillips*, 1 My. & K. 649; *Bisset on Partnership*, p. 50; *Broom v. Broom*, 3 My. & K. 443; *Houghton v. Houghton*, 11 Sim. 491.

Another exception as to words creating an estate in joint-tenancy is in the

case of marriage articles; for as joint-tenancy, as a provision for the children of a marriage, is an inconvenient mode of settlement, (inasmuch as during their minorities no use can be made of their portions for their advancement, as the joint-tenancy cannot be severed,) Courts of Equity, in decreeing a settlement to be made or rectified, will often construe words, which at law would give a joint-tenancy, as creating a tenancy in common. *Taggart v. Taggart*, 1 S. & L. 84, 88; *Rigden v. Vallier*, 3 Atk. 734; *Marryat v. Townly*, 1 Ves. 102; sed vide *Staples v. Maurice*, 4 Bro. P. C. 580, Toml. Ed.

What Words will give a Joint-Tenancy by Will.

It may be laid down as a general rule that a devise to two or more persons simpliciter of realty (6 Cruise, Dig. tit. 38, c. 15, s. 1), or a bequest of chattels, whether real or personal (*Shore v. Billingsly*, 1 Vern. 482; *Willing v. Baine*, 3 P. Wms. 113; *Barnes v. Allen*, 1 Bro. C. C. 181), whether it be a legacy of money or of a residue (see observations in principal case, and *Crooke v. De Vandes*, 9 Ves. 204, overruling *Cox v. Quantock*, 1 Ch. Cas. 238; *Sanders v. Ballard*, 3 Ch. Rep. 214; and the dicta attributed to Lord Thurlow in *Perkins v. Baynton*, 1 Bro. C. C. 118), and whether the gift be accompanied by a trust or not (*Aston v. Smallman*, 2 Vern. 556; *Bustard v. Saunders*, 7 Beav. 92), or whether it be made to individuals or to classes, as to next kin (*Withy v. Mangles*, 4 Beav. 358; *Baker v. Gibson*, 12 Beav. 101), issue (*Williams v. Jehyl*, 2 Ves. 681, 684; *Hill v. Nalder*, 17 Jur. 224), family (*Wood v. Wood*, 3 Hare, 65; *Gregory v. Smith*, 9 Hare, 708), or children (*Oates d. Hatterley v. Jackson*, 2 Str. 1172; *Mence v. Bayster*, 4 De G. & Sm. 162; *Kenworthy v. Ward*, 17 Jur. 1047; *Mason v. Clarke*, 17 Beav. 126), will confer a joint-tenancy.

An objection has been made in the case of a devise to children on attaining twenty-one, that they must take as tenants in common, as it is contrary to the rule of law, that persons who are to take at different times should take as joint-tenants (*Woodgate v. Unwin*, 4 Sim. 129); but it seems to be the better opinion that a devise stands upon the same footing in this respect as a conveyance to uses, by which, as we have before seen (ante, p. 718), an estate in joint-tenancy can be given so as to take effect at different times. See *Kenworthy v. Ward*, 17 Jur. 1047.

In the case of executory trusts Courts of Equity lean strongly in favour of tenancy in common, *Marryat v. Townly*, 1 Ves. 102; *Owen v. Penny*, 14 Jur. 359; *Head v. Randall*, 2 Y. & Coll. C. C. 231; *Alloway v. Alloway*, 12 Sim. 645; sed vide *White v. Briggs*, 2 Phill. 583.

Words which, standing by themselves, will create a joint-tenancy, will not, by being connected by the word "also" with a gift to persons as tenants in common, have their import changed so as to confer a tenancy in common (*Cookson v. Bingham*, 17 Beav. 262); nor will accruing shares be held by a tenancy in common merely because the original shares are so held. *Jones v. Hull*, 16 Sim. 500; *Leigh v. Mosley*, 14 Beav. 605; and see *Webster's Case*, 3 Leon. 19, pl. 45). And upon the same principle, where children or the issue of legatees, are in certain events substituted for their parents, they will not necessarily take amongst themselves as tenants in common because their parents took that estate. *Bridge v. Yates*, 12 Sim. 645; *Amies v. Skillern*, 14 Sim. 428.

It may here be mentioned, that where there is a conveyance or devise to husband and wife, in such terms as would, in the case of other persons, make them joint-tenants in fee, they will take as tenants by entireties. See post, p. 730.

What will sever an Estate in Joint-Tenancy.

An estate in joint-tenancy may be severed by operation of law or act of the parties, and the estate being thereby converted into one of a different nature, it loses its peculiar incidents.

An estate in joint-tenancy will be severed by operation of law when one of several persons having an interest for their lives, acquires the reversion either by purchase or descent. Thus in *Wiscot's Case* (2 Co. 60 b), A. was tenant for life, with remainder to B. and three others for life, with reversion to C. and his heirs expectant; C. levied a fine sur conusans de droit come ceo, &c., to A. and B., to the use of A. for life, and after his death to the use of B. in fee. A. died, and afterwards B. died; the question arose, whether the joint-tenancy was severed or not, so that after A.'s death B. was tenant in common. And this distinction was taken, "when the fee is limited by one and the same conveyance, there the one may have a fee simple, and the other an estate for life jointly; but when they are first tenants for life, and afterwards one of them doth get the fee simple, or the fee simple doth descend to one, there the jointure is severed. As if a man makes an estate to three, and to the heirs of one of them, there one of them hath a fee simple, and yet the jointure doth continue, for all is but one entire estate, created at one and the same time; and therefore the fee simple cannot merge the jointure, which took effect with the creation of the remainder in fee. But when three are joint-tenants for life, and afterwards one purchaseth the fee, or the fee descends to him, there the fee simple merges the estate for life; for the estate for life was in esse before, and might be merged or surrendered, and so can-

not the estate for life in the first case. But in the same case, that is to say, when an estate is made to three, and to the heirs of one of them, and he who has the fee dies, and one of the survivors purchases the remainder, the jointure is severed." See also 2 And. 202; 2 Cruise, Dig. tit. 18, c. 2, ss. 3—8.

An estate in joint-tenancy may be destroyed, by the devolution of all the shares on one of the joint-tenants, by survivorship, by which he acquires an estate in severalty. 2 Cruise, Dig. tit. 18, c. 2, s. 49.

It may also be severed by *the act of the parties*, so far as regards his own share by the alienation of one joint-tenant, to a stranger (Litt. s. 292), for the alienee will hold as a tenant in common with the other joint-tenants (Ib.). So, likewise, a mortgage by a joint-tenant of his entire interest will sever the joint-tenancy. *York v. Stone*, 1 Eq. Ca. Abr. 293; 1 Salk. 158.

Although if one joint-tenant alien his share to a stranger, the latter holds as tenant in common with the other joint-tenants; nevertheless, the other joint-tenants still continue to hold jointly, and survivorship will take place amongst them. Litt. s. 294.

One of two joint-tenants may destroy the tenancy by releasing to the other. Co. Litt. 273 b.

If there be three joint-tenants, and one release by deed to one of the others all the right which he has in the land, then he to whom the release is made has the third part of the lands by force of the release, and he and his companion will hold the other two parts in joint-tenancy; and as to the third part which he had by force of the release, he holds that third part with himself and his companion in common. Litt. s. 304.

If there be two joint-tenants in fee, and one joint-tenant grants a rent-charge out of his part, and afterwards releases to the other and dies, the releasee will hold the land charged, because he claims under the release and not by survivorship. Co. Litt. 185 a; and see *Lord Abergavenny's Case*, 6 Co. 78 b.

A release is the proper conveyance from one joint-tenant to another; but the Courts will hold a grant to amount to a release. *Chester v. Willan*, 2 Saund. 96; *Eustace v. Scaven*, Cro. Jac. 696.

A question often arises, how far a partial alienation effects a severance. It seems to be clear, that if there be two joint-tenants in fee, and one of them makes a lease of his share for his own life, a severance will be effected during that period, and the lessee and the other joint-tenant will hold as tenants in common (Litt. s. 302); and it seems to be the better opinion, that there is also a severance of the fee, so that, on the death of the lessor, his interest will descend to his heir, and not be liable to survivorship. Ib.; Co. Litt. 191 b.

So, likewise, if there are joint-tenants for a term of years, and one of them lets his part for part of the term, the joint-tenancy is severed, and there is no survivorship, because, says Coke, "a term for a small number of years, is as high an interest as for many more years." Co. Litt. 192 a.

An agreement by a joint-tenant to sell, though it does not sever the joint-tenancy at law, will in equity (3 Ves. 257; sed vide 2 Vern. 63); but an agreement will not have that effect, if it be not for valuable consideration (*Moyse v. Gyles*, Prec. Ch. 124); and it has been held, that articles of agreement by an *infant*, though made in consideration of marriage, will not effect a severance. *May v. Hook*, Co. Litt. 246 a, n. 1.

A joint-tenancy cannot be severed by a will, according to the well-known maxim, "*Jus accrescendi præfertur ultimæ voluntati.*" 2 Cruise, Dig. tit. 18, c. 2, s. 19.

In the case of chattels real, the joint-tenancy is not severed by marriage, because the property does not vest in the husband; but in the case of chattels personal it is severed by the marriage, because the property does vest in him. Co. Litt. 185 b; *Bracebridge v. Cooke*, Plowd. 417.

Upon the same principle, in a recent case, a woman, joint-tenant of a reversionary interest in a legacy of 2,000*l.* stock, married; and after the marriage the husband became bankrupt, and then the wife died, leaving the tenant for life of the fund surviving; it was held by Sir George Turner, V.C., that, by the death of the wife, the other joint-tenants of the fund became entitled to her interest therein by survivorship; that that was the elder title to that of the husband, which also accrued after the death of the wife; and that upon the death of the tenant for life the other joint-tenants, and not the assignees of the husband, were entitled to what had been the wife's share of the fund. *In re Trusts of Barton's Will*, 10 Hare, 12.

A joint-tenancy may also be destroyed by *voluntary* partition among the parties themselves; but it is essential that it should be by deed. Co. Litt. 187 a; 8 & 9 Vict. c. 106, s. 3.

Where joint-tenants enter into a valid agreement to hold as tenants in common, although the legal estate will be held in joint-tenancy, there will in equity be a severance (2 Cruise, Dig. tit. 18, s. 46; see also *Tremen v. Relfe*, 2 Bro. C. C. 220); except in the case of husbands entering into such an agreement relative to the joint inheritance of their wives. *Ireland v. Ritle*, 1 Atk. 541; sed vide Co. Litt. 171 a, note 29; F. N. B. 62 F.

At common law, except by custom, no compulsory partition could be effected by one joint-tenant; this inconvenience, however, was obviated by statute 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32, by which, under the writ *De partitione faciendâ*, a joint-tenant was enabled by action at common law to obtain a compulsory partition. Booth's Real Act. 244; see also 8 & 9 Will. 3, c. 31; made perpetual by 3 & 4 Anne, c. 18, s. 2.

For a long period, however, partitions have been obtained by bill filed in Chancery, and now the writ *De partitione faciendâ* having been abolished (3 & 4 Will. 4, c. 27, s. 3), a compulsory partition can only be effected by the Court of Chancery. See *Agar v. Fairfax*, 2 L. Cas. Eq. 329, and note.

III. *Tenancy in Common.*

Tenants in common, like joint-tenants, take by *purchase*, the essential difference, however, between joint-tenants and tenants in common is, that, although the occupation in both cases is undivided, tenants in common hold not by a joint estate as joint-tenants, but by several titles; so that, upon the death of one of them intestate, there is no survivorship, but his share, if of inheritance, descends to his heir.

"The essential difference," says Coke, "between joint-tenants and tenants in common is, that joint-tenants have the lands by one joint title and in one right, and tenants in common by several titles, or by one title and several rights; which is the reason that joint-tenants have one joint freehold, and tenants in common have several freeholds. Only this property is common to them both, viz. that their occupation is undivided, and neither of them knoweth his part in severalty" (Co. Litt. 189 a). If, for instance, a man convey to two persons as joint-tenants in fee, and one of them aliens what belongs to him to another in fee, the alienee and the other joint-tenant are tenants in common, because they are in such tenements by several titles; for the alienee is entitled to a moiety by the conveyance of one of the joint-tenants, and the other joint-tenant has the other moiety by force of the first conveyance made to him and his companion, and so they are in by several titles, that is to say by several conveyances. Litt. s. 292.

Tenants in common are in by one title and several rights, when, for instance, there is a devise to two persons and their heirs equally to be divided between them, there they hold by one title, viz. the will, but by several rights.

A partition of a tenancy in common may be effected, either voluntarily by the agreement of the parties, or compulsorily by proceedings in equity, the writ *De partitione faciendâ* (by which a partition might have been effected by the intervention of Courts of Common Law) having been abolished by 3 & 4 Will. 4, c. 27, s. 3.

What Words in a Deed will create a Tenancy in Common.

The usual mode of creating a tenancy in common by deed is to limit the estate to two or more persons, equally to be divided among them as tenants

in common and not as joint-tenants. 4 Cruise, Dig. tit. 32, c. 22, s. 58; *Anon.*, 2 Vent. 365; *Hamell v. Hunt*, Prec. Ch. 164; *Fisher v. Wigg*, 1 P. Wms. 14; 12 Mod. 296; 1 Eq. Ca. Abr. 291, note (a); *Rigden v. Vallier*, 2 Ves. 252; *Goodtitle v. Stokes*, 1 Wils. 341.

Where, however, estates are given to two persons in different capacities, without words of division, as they cannot take as joint-tenants, they will take as tenants in common. Thus if lands be given to two bishops, to have and to hold to them and their successors; as they take in their corporate, and not individual, capacity, they will be tenants in common, because they are seised in several rights; for one bishop is seised in the right of his bishopric of one moiety, and the other is seised in the right of his bishopric of the other moiety, and so by several titles and in several capacities; whereas joint-tenants ought to have it in one and the same right and capacity, and by one and the same joint title. Co. Litt. 190 a.

The law is the same if lands be given to two parsons and their successors, or to any other such like ecclesiastical bodies politic or incorporate. Ib.

So, likewise, if lands be given to a parson and to a layman, to have and to hold to them, that is to say, to the parson and his successors, and to the layman and his heirs, they will presently become tenants in common. Ib.

And if lands be given to a bishop and his successors, and to the same person in his individual capacity and his heirs, he will be tenant in common with himself (Ib.). But if lands be given to a bishop in his individual capacity, and to a layman, to have and to hold to them two and to their heirs, in this case they are joint-tenants, for each of them takes the lands in his natural capacity. Ib.

If lands be given to the king and to a subject, to have and to hold to them and to their heirs, yet they are tenants in common and not joint-tenants; for the king is not seised in his natural capacity, but in his royal and politic capacity in jure coronæ, which cannot stand in jointure with the seisin of the subject in his natural capacity. Ib.

So, likewise, if there be two joint-tenants, and the crown descend to one of them, the jointure is severed, and they become tenants in common. Ib.

Also, if lands be conveyed to two persons to have and to hold as to one moiety to the one and his heirs, and as to the other moiety to the other and to his heirs, they are tenants in common (Litt. s. 298); for they have several freeholds, and an occupation pro indiviso. And here it will be observed, that the habendum severs the premises that primâ facie seemed to be joint; for an express estate controls a joint estate. Co. Litt. 190 b.

Where a person seised of lands enfeoffs another of a moiety of the same, without any limitation of the same moiety in severalty at the time of the

feoffment, then the feoffee and the feoffor will hold their parts of the land in common. Litt. s. 299; Co. Litt. 190 b.

So, where there are two joint-tenants, and one grants a lease of his interest to another person for life, and the other does so likewise, the two lessees are tenants in common for their lives. Litt. s. 300.

If there be a lease of lands to two persons for term of their lives, and the longer liver of them, and one of them grants his part to a stranger, whereby the joint-tenancy is severed, and dieth, no survivorship will take place, but the lessor may enter into the moiety, and the survivor will derive no advantage from the words "and the longer liver of them," for two causes; first, because the joint-tenancy is severed; secondly, because those words express no more than the common law would have implied without them; and expressio eorum quæ tacitè insunt nihil operatur. Hence it appears that in the case of leases for life it is more beneficial for the lessor to have the joint-tenancy severed than for it to continue. Co. Litt. 191 a.

If there are two coparceners and one aliens what belongs to her to a stranger, the other parcener and the alienee are tenants in common. Litt. s. 309.

Persons may be tenants in common (Litt. s. 310), but not joint-tenants (Co. Litt. 195 b) by prescription, as the survivorship among the latter would evidently prevent a claim by such a title. Ib.

As to a tenancy in common in tail with cross remainders, see ante, pp. 526—530.

What Words in a Will create a Tenancy in Common.

As a general rule, wherever property is given to two or more persons by will, in terms showing that a division amongst them is intended, they will take as tenants in common. Thus where property is "*to be divided*" (*Peat v. Chapman*, 1 Ves. 542; *Ackerman v. Burrows*, 3 V. & B. 54), "*to be equally divided*" (*Phillips v. Phillips*, 1 Eq. Ca. Abr. 291, pl. 6; *S. C.* 2 Vern. 430; 1 P. Wms. 34; *Barker v. Giles*, 2 P. Wms. 280; *Jolliffe v. East*, 3 Bro. C. C. 25), or "*to be distributed in joint and equal proportions*" (*Ettriche v. Ettriche*, Amb. 656; *Gibbon v. Warner*, 14 Vin. Abr. 484, 485), a tenancy in common will be thereby conferred.

Again, where there is a gift of property by will "to" or "amongst" persons "*equally*" (*Leven v. Dodd*, Cro. Eliz. 443; *Denn v. Gashin*, Cowp. 657), "*share and share alike*" (*Heathe v. Heathe*, 2 Atk. 122; *Perry v. Woods*, 3 Ves. 204), "*in equal moieties*" (*Harrison v. Foreman*, 5 Ves. 207), "*amongst*" (*Richardson v. Richardson*, 14 Sim. 526) or "*between*" (*Lashbrook v. Cock*, 2 Mer. 70) them, or "*respectively*" (*Stephens v.*

Hide, Ca. t. Talb. 27; *Haves v. Haves*, 1 Ves. 13; *Marryat v. Townly*, 1b. 102; *Folkes v. Western*, 9 Ves. 456) "to each," of several persons (*Hatton v. Finch*, 4 Beav. 186), or "to each of their respective heirs" (*Gordon v. Atkinson*, 1 De G. & Sm. 478), it will create a tenancy in common. See also *Thoromgood v. Collins*, Cro. Car. 75; *Sheppard v. Gibbons*, 2 Atk. 441; *Loveacres d. Mudge v. Blight*, Cowp. 352.

And where there was a bequest to persons, in terms which standing alone would have made them joint-tenants, it was converted into a tenancy in common by a power to raise "in part of the share" of one of the parties (*Gant v. Laurence*, Wight. 396), and by a direction that each of them should pay a moiety of an annual charge. *Kew v. Rouse*, 1 Vern. 353; 1 Eq. Ca. Abr. 291, pl. 7.

Subsequent expressions, however, after words, which we have before seen, standing by themselves, will confer a tenancy *in common*, may show that it was the testator's intention to confer an estate in joint-tenancy, as by a gift over being only to take effect after the decease of the survivor of several persons (*Stephens v. Hide*, Ca. t. Talb. 27; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Armstrong v. Eldridge*, 3 Bro. C. C. 215; *Tuckerman v. Jefferies*, 3 Bac. Abr. "Joint-Tenants," (F) 681, 6 Ed.; 11 Mod. 108; *Townley v. Bolton*, 1 My. & K. 148; *M'Dermott v. Wallace*, 5 Beav. 142; *Pearce v. Edmeades*, 3 Y. & Coll. Exch. Ca. 246; *Ashley v. Ashley*, 6 Sim. 358); the intention, however, must be clear. *Hurd v. Lenthall*, Sty. 211.

In *Doe d. Boirvell v. Abey*, 1 Mau. & Sel. 428, the testator devised an estate to three sisters by name, for and during their joint natural lives, and the natural life of the survivor of them, to take as tenants *in common* and *not as joint-tenants*, remainder to trustees after the determination of their *respective estates*, "during the respective lives of his said three sisters and the life of the survivor of them," to preserve contingent remainders; and "from and after the respective deceases of his said three sisters and the decease of the survivor of them," remainder over. It was held by the Court of King's Bench, that the three sisters took as joint-tenants. "The fair construction," said Bailey, J., "is to treat it as a devise to the sisters as tenants in common with benefit of survivorship, and thereby give effect to all the words. A tenancy in common, with benefit of survivorship, is a case which may exist, without being a joint-tenancy, because survivorship is not the only characteristic of a joint-tenancy." See also *Hatton v. Finch*, 4 Beav. 186; *In re Drakeley's Estate*, 19 Beav. 395.

Upon the same principle, although the words "equally to be divided or enjoyed," may be made use of, it may appear to be the intention of the testator upon the whole will taken together, to give an estate in joint-

tenancy and not an estate in common. Thus in *Cookson v. Bingham*, 17 Beav. 262, where the testator devised his estates in Westmoreland to his three daughters, "to be jointly and equally enjoyed or divided in case of marriage of any of them, and they or the survivor, in the case of death, are hereby fully authorized to dispose of the same by will or assignment." It was held by Sir J. Romilly, M. R., that the first words gave the fee, and the latter created a joint-tenancy, and that the survivor alone had power to devise.

IV. *Tenancy by Entireties.*

Where an estate is conveyed or devised to a man and his wife *during coverture*, they are said to be seised as *tenants by entireties*, that is to say, each is seised of the whole estate, or per tout, and not per my et per tout, as joint-tenants (Co. Litt. 326 a; 3 Co. 27 b; 8 Co. 72); so that upon the death of one of them, the other takes the whole estate, not by the happening of that event, but under the original limitation. But although there is in fact no survivorship, the effect is, that the surviving husband or wife takes the whole estate, not as a new acquisition, but as an estate freed from participation by another (Watk. Convey. by Mor. Coote & Cov. 170, 8th Ed.). During coverture the husband alone can only convey his own interest, and in order to convey the whole interest, the wife (except in the case of a term of years, which the husband can assign so as to bind her interest (*Ib.* 171)) must concur, under 3 & 4 Will. 4, c. 74.

The consequence of this tenancy is, that if a conveyance or devise be made to a husband and wife, and another person, the husband and wife will take one moiety only, and the third person the other moiety. "The cause is," says Littleton, "for that the husband and wife are but one person in law, and are in like case as if an estate be made to two joint-tenants, where the one hath by force of the jointure the one moiety in law, the other the other moiety." Litt. s. 291; see also *Lewin v. Cox*, Moore, 558, pl. 759; Skinn. 182; *Bricher v. Whatley*, 1 Vern. 233.

So, likewise, where there is a bequest of personalty to a husband and wife and a third party, in words which would confer a joint-tenancy in the case of other persons, the husband and wife take only one share (*Atcheson v. Atcheson*, 11 Beav. 485; *Moffat v. Burnie*, 16 Beav. 298; 18 Beav. 211); and precisely the same reasons apply to a gift to the husband and wife in words ordinarily conferring a tenancy in common. Thus in a recent case, where a testator bequeathed the sum of £700 unto and amongst J. C. and C. his wife, and W. L. in *equal* shares and proportions; it was held by the Lords Justices of the Court of Appeal, that J. C. and C. his wife took

one moiety, and W. L. the other moiety, although in another part of the will, three legacies of 300*l.* were given to J. C., C. his wife and W. L. *In re Wyld's Estate*, 2 De Gex, Mac. & Gord. 724. See also *Warrington v. Warrington*, 2 Hare, 54; sed vide *Paine v. Wagner*, 12 Sim. 184; *Bricker v. Whatley*, 1 Vern. 233; *Lewin v. Cox*, Moore, 558, pl. 759; *Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547.

A conveyance or devise to a man and woman in fee who *afterwards* intermarry, will not make them tenants by entireties, as they will be joint-tenants both before and after marriage, and the husband may at any time, by alienation, sever his moiety. Co. Litt. 187 b, 356; 1 Prest. Convey. 55, 155; 2 Prest. Abs. 39.

ELLIOT v. DAVENPORT (a).

De Term. S. Michaelis, 1705.

[REPORTED 1 P. Wms. 83.]

LAPSE.]—*A. bequeathed to B. 400l. which he owed him, provided he should pay thereout several sums to his children ; the rest he freely gives him, and directs his executors to deliver up the security, and not to claim any part of the debt, but to give such release as B., his executors, &c., should require. B. dies in the life of A.:—Decreed, this was a lapsed legacy.*

SIR WILLIAM ELLIOT was indebted unto Anne Davenport in 400l. by recognizance ; and afterwards Anne Davenport by her will gave and bequeathed unto Sir William Elliot, his executors, administrators and assigns, the sum of 400l. which he owed her, together with all interest due for the same, provided that he the said Sir William Elliot should pay out of the said 400l. the several legacies thereafter mentioned to his children (amounting to about 150l.) ; and the residue of the said 400l. she gave to the said Sir William Elliot, his executors, administrators and assigns ; and by her said will desired and appointed her executors not by any means to claim or meddle with the said 400l., but that they should freely deliver up the security for the same into the hands of the said Sir William Elliot, his executors, administrators and assigns, and seal and execute unto the said Sir William Elliot, &c., all such reasonable releases and discharges, and acknowledge

(a) 8 C. 2 Vern. 521 ; 1 Eq. Ca. Abr. 296, pl. 1 ; 2 Eq. Ca. Abr. 540, pl. 4

satisfaction for the said 400*l.*, for the safety of Sir William Elliot, &c., as the said Sir William Elliot, &c., should think fit.

Sir William Elliot died in the lifetime of the testatrix, after which the testatrix died; and William Elliot, the heir of Sir William, brought this bill against the executor of Mrs. Davenport in order to be discharged of this recognizance.

Upon which the question was, concerning so much of the 400*l.* as was to remain to Sir William after payment of the legacies to his children, whether that was not a lapsed legacy by reason of the death of Sir William before the testatrix.

1st. It was agreed by the Court, and likewise by the counsel on both sides, that where one gives a legacy to a man, his executors, administrators and assigns, if in such case the legatee dies in the life of the testator, though the executors are named, yet the legacy is lost; for the words "executors, administrators and assigns" are void, being but surplusage, *et expressio eorum quæ tacite insunt nil operatur*; and they are, by supposition of law, named only to take in succession and by way of representation, as an heir represents the ancestor in case of an inheritance; and to this purpose *Brett and Rigden's Case* (Plowd. 340) was cited, where lands being devised to a man and his heirs, and the devisee dying in the life of the testator, it was held that the devise was void, and the heir could not take (*b*); consequently, if the question here had depended upon this clause only, the legacy had been lost.

2ndly. It was held, that a will might be so penned, as that though the legatee died in the life of the testator, yet his executors should have the legacy; but then it ought to appear in the will plainly, and by direct words, that this was the testator's intention; and though a will could not (as was allowed) enure as a release (*c*), even supposing it to be sealed and delivered, for want of its taking effect in the testator's lifetime, yet, provided it were expressed to be the intention of the party that this debt should be discharged, the will would operate accordingly.

Lord Keeper Cooper therefore said, that if this question had depended only upon the latter clause, (*viz.*) that this security should be

(*b*) *S. C.* 11 East, 551, note (*d*).

(*c*) 1 Vent. 39; *Rider v. Wager*, 2 P. Wms. 332.

delivered up to Sir William Elliot, his executors, administrators or assigns, in such case it would be plainly an absolute discharge of the debt, though the testatrix had survived the legatee.

So that the question was reduced to this, whether the latter clause was to be taken as distinct from, or independent of, the former clause, in which case the legacy would subsist; or whether it ought to be looked upon as ancillary to and dependent upon it (scil.) if the legacy took effect, then, and then only, the executor, in consequence of it, was to release.

And his Lordship decreed, that this latter clause was dependent upon the former; and therefore that the legacy, being a lapsed legacy, upon the former clause, the latter did not prevent it. That what made such construction appear the more reasonable was, that the like clause, in much the same words, was added to the other legacies given by the same will, which could not operate by way of release or extinguishment; and though it might be the intent of the testatrix that the executors of the legatee should have the benefit of the legacy (as probably this is always the intent where a legacy is given to a man, his executors, &c.), yet the law being otherwise, such intent must not prevail; for which reason, a will that designs to prevent the lapsing of a legacy, by the death of the legatee in the life of the testator, ought to be specially penned (d).

Note.—The Master of the Rolls, who heard this cause the day before, but adjourned it over for the Lord Keeper's determination (before whom it had been in part first heard), was of another opinion. The Lord Keeper also said it was a doubtful case.

Elliot v. Davenport is a leading case upon the well-established rule, that a testamentary disposition will lapse by the death in the lifetime of the testator of the party to whom a benefit is thereby given; and it was admitted there by the counsel on both sides, and agreed to by the Court, that the

(d) An appeal was brought from this decree to the House of Lords, but before hearing the parties agreed.

mere addition of words of limitation will not take a case out of the general rule. If, therefore, a bequest to a man be followed by such words as "his executors, administrators and assigns," or "his representatives," they will not prevent the lapse of a legacy by the death of the legatee in the lifetime of the testator; for they are considered as only descriptive of the interest bequeathed, and because those who take by representation only, cannot be entitled to anything to which the person whom they represent never had any title. See *Corbyn v. French*, 4 Ves. 418; ante, p. 408; *Shuttleworth v. Greaves*, 4 My. & Cr. 35, 39. The same doctrine is applicable to a limitation to a man "and his heirs," as the heirs merely take by way of representation. *Brett v. Rigden*, Plowd. 345; *Fuller v. Fuller*, Cro. Eliz. 422; *Wynn v. Wynn*, 3 Bro. P. C. 95, Toml. Ed. See also *Goodright v. Wright*, 1 P. Wms. 397; *Ambrose v. Hodgson*, 3 Bro. P. C. 416, Toml. Ed.

The rule as to lapses is equally applicable to cases where the devisee or legatee is dead at the time the will is made, as when he dies afterwards during the life of the testator. *Maybank v. Brooks*, 1 Bro. C. C. 84.

The principal case also decides, that when the legacy is of a debt, it is liable to lapse in the same manner as any other gift by will. See also *Toplis v. Baker*, 2 Cox, 118; *Maitland v. Adair*, 3 Ves. 231.

The reporter indeed observes, in a note, that the Master of the Rolls was not of the same opinion as the Lord Keeper, and that the Lord Keeper himself said it was a doubtful case. It was, however, it is submitted, decided upon correct principles, and it has been treated as a guiding authority by subsequent Judges. See *Toplis v. Baker*, 2 Cox, 122; *Pickering v. Lord Stamford*, 3 Ves. 493; *Maitland v. Adair*, Ib. 231; *Izon v. Butler*, 2 Price, 34. See, however, and consider *Sibthorpe v. Moxton*, 1 Ves. 49; *S. C. nom. Sibthorpe v. Moxom*, 3 Atk. 580; *South v. Williams*, 12 Sim. 566; *Davis v. Elmes*, 1 Beav. 131; *Williamson v. Naylor*, 3 Y. & Coll. Exch. Ca. 208; *Philips v. Philips*, 3 Hare, 281.

The doctrine of equity respecting lapses is applicable equally to cases where the legatee takes under a will made in exercise of a power, as in cases where he takes under a will simply. This was well explained by Lord Hardwicke in *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 78, in which case Lord Hardwicke made the following observations:—"I admit," said his Lordship, "the principle, that where a person takes by execution of a power, whether of realty or personalty, it is taken under the authority of that power; but not from the time of the creation of that power. There is no case that the relation shall go back for that which is quite of another nature; and that is the point which must be contended for here, that they must take by relation, so as to make them take from the

time of the creation of the power, for which there is no authority, and that would be unreasonable. The meaning that persons must take under the power, or as if their names had been inserted in it, is, that they shall take in the same manner as if the *power*, and the *instrument* executing it, had been incorporated in one instrument; then they shall take, as if all that was in the instrument executing had been expressed in that giving the power. So it is in appointments of uses. If a feoffment be executed to such uses as the feoffor shall appoint by will; when the will is made, it is clear that the appointee cestui que use is in by the feoffment, but has *nothing from the time* of the execution of the feoffment, so as to vest the estate in him. The estate will vest in him according to the nature of the act done, and appointment of the use, from the time of the testator's death. This, therefore, is not a relation so as to make things vest from the time of the power, but according to the time of that act executing the power; not like the referring back in case of assignment in a commission of bankruptcy, for that is by force of the statute, and to avoid mesne wrongful acts." See also *Oke v. Heath*, 1 Ves. 135, 141; *Vanderzee v. Aclom*, 4 Ves. 771; *Burges v. Marney*, 10 Ves. 319, 326.

But the general rule may, as was admitted in the principal case, be controlled by a will specially penned, that is to say, by the testator's intention appearing upon the face of the will to substitute some other person for the legatee dying in his lifetime, though without such substitution a mere declaration that a gift shall not lapse will have no effect. Thus in *Sibley v. Cook*, 3 Atk. 572, a testatrix made her will as follows:—"I give and devise the several legacies and sums following, which I will shall be paid to the several persons hereinafter named; and that if any of those persons should die before the same become due and payable, I will that they, or any of them, shall not be deemed lapsed legacies." Then she particularizes the several legatees, and says, "to A., the wife of R. W., and to her executors or administrators, I give the sum of 50l." It was held by Lord Hardwicke, that the legacy of 50l. did not lapse by the death of A. in the lifetime of the testatrix. "If," said his Lordship, "a man devises a real estate to J. S. and his heirs, and signifies or indicates his intention that if J. S. die before him, it should not be a lapsed legacy, yet, unless he had nominated another legatee, the heir-at-law [that is to say the testator's] is not excluded, notwithstanding the testator's declaration. So in a devise of a personal legacy to A., though the testator should show an intention that the legacy should not lapse in case A. die before him, yet this is not sufficient to exclude the next of kin. But here, in case A. dies before the testatrix, she expressly provides against the lapsing; for she says, '*if any of these persons die before the same become due and payable, I will that they, or any of them,*

shall not be deemed lapsed legacies;' and subsequent to this devises to A. and to her executors or administrators 50l., so that, in case of her death before the testatrix, other persons are named to take, which distinguishes it from the case I put before."

Where the testator limits over to the survivors the share of any of the tenants in common who may die, no lapse will take place (*Mackinnon v. Peach*, 2 Keen, 555).

But where distinct legacies are given with a clause of survivorship, the general rule is, that unless the clause be extended by particular words, it attaches only to the original shares, and does not affect the accruing shares. "As where a man gives a sum, suppose of 1,000l., to be divided amongst four persons as tenants in common, and that if one of them die before twenty-one or marriage, it shall survive to the other: if one dies, and three are living, the share of that one so dying will survive to the other three; but if a second dies, nothing will survive to the remainder but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship." Per Lord Hardwicke in *Pain v. Benson*, 3 Atk. 80: see also *Perkins v. Micklethwaite*, 1 P. Wms. 274; *Rudge v. Barker*, Ca. t. Talb. 124; *Ex parte West*, 1 Bro. C. C. 575; *Crowder v. Stone*, 3 Russ. 217; *Rickett v. Guillemard*, 12 Sim. 88; *Bright v. Rome*, 3 My. & K. 316. This rule, although disapproved of, has nevertheless been always acted upon; and notwithstanding Lord Hardwicke, in *Pain v. Benson*, thought that the circumstances of the case took it out of the rule, the authority of his decision has been questioned. See *Ex parte West*, 1 Bro. C. C. 575.

The principal exception to the rule is where the disposition is, not of separate legacies, but of one aggregate fund, which the testator meant should remain an aggregate fund, and should not be broken into fragments, if some of the persons to whom interests in it were given, happened to die. Per Sir Thomas Plumer, M. R., in *Barker v. Lea*, T. & R. 415; see also *Worlidge v. Churchill*, 3 Bro. C. C. 465; *Eyre v. Marsden*, 2 Keen, 564; 4 My. & Cr. 231; *Sillick v. Booth*, 1 Y. & Coll. C. C. 121.

The opinion both of Lord Chief Baron Eyre and Lord Brougham coincide with that of Lord Hardwicke, that in order to prevent a lapse it is not sufficient for the testator, merely by a negative provision, to say that a lapse shall not take place by the predecease of the legatee, but he must actually designate a substitute for him on the happening of that event. Thus in *Toplis v. Baker* (2 Cox, 121), Chief Baron Eyre says, "Put the case of a testator saying, 'I give to A., and if A. shall die before me, yet I do not mean the legacy shall lapse;' I should not know how to prevent this legacy lapsing; but if the testator had said, 'If A. shall die, I mean his

executors shall take it,' then I understand the effect very clearly, the executors being specially mentioned and substituted for the legatee." And see the remarks of Lord Brougham in *Gittings v. M'Dermott*, 2 My. & K. 75, 76; and see *Johnson v. Johnson*, 4 Beav. 318; *Long v. Watkinson*, 21 L. J., Ch., 844; *Hewitson v. Todhunter*, 22 L. J., Ch., 76; *Hinchliffe v. Westwood*, 2 De G. & Sm. 216.

In *Bridge v. Abbot* (3 Bro. C. C. 224), where the testatrix having substituted for the legatees dying in her lifetime their "legal representatives," on the death of one of the legatees, Lord Alvanley, M. R., held that the legacy did not lapse, but went to such persons as would have been entitled as his next of kin at the death of the testatrix, in case he had at that time died intestate. See also *Vaux v. Henderson*, 1 J. & W. 388, note (c); *Bone v. Cook*, M'Clell. 168; *S. C.* 13 Price, 332; *Collins v. Johnson*, 8 Sim. 356, note (e).

It seems now to be decided, that the intention of substitution will be implied where there is a gift to a person or his personal representatives or his heirs. See *Gittings v. M'Dermott*, 2 My. & K. 69, there the testator gave to the children of his sister, the late E. W. (whose names he enumerated), "or to their heirs," certain legacies. And he also gave all the residue of his property "in equal shares to each of his sisters, M. S. and S. G., and upon their deaths respectively to their heirs." Three of the children of E. W. and both the sisters died in the lifetime of the testator. It was held by Sir John Leach, M. R., and by Lord Chancellor Brougham on appeal, first, that the legacies to those children did not lapse, but that their next of kin took by substitution at the death of the testator; and secondly, that the next of kin of M. S. and of S. G., living at the death of the testator, were entitled by substitution to the gift of the residue. With reference to the first question (which both the learned Judges considered to be free from difficulty), the Master of the Rolls observed, "A will speaks from the death of the testator, unless his intention be clearly manifested to the contrary. When, therefore, the testator gives the several legacies of stock to the children of his sister, or to their representatives, he plainly intends, that if any of the children should not be living at his death, their representatives should take by substitution. This is the effect of the word 'or,' which differs wholly from that which must have been given to the bequest, had the word 'and' been used." With regard to the second question, both the learned Judges also thought, although it was considered more difficult than the former, that the words in the residuary clause imported an intention on the part of the testator to give the residue of his estate by way of substitution upon the respective deaths of his sisters. But Lord Brougham observed, that his opinion as to the construction to be put upon the words "upon their deaths,"

rested not only upon the words taken by themselves, but upon the whole context, and the preceding parts of the will. That the current of authorities upon analogous cases, there being none upon the expressions there employed, would certainly lead to the conclusion, that if the gift stood alone, a lapse could not easily be prevented; and that his opinion was formed upon the construction of the foregoing gifts to the sister's children precluding a lapse as to those legacies, and that there arose from thence an inference not to be avoided or resisted, that the words employed, touching the residue must be taken in a like sense. See also *Cotton v. Cotton*, 2 Beav. 67.

This last class of cases must, however, be carefully distinguished from another one, at first sight very similar, when the gift of the legacy to the legatee, "*or his executors or administrators,*" "*or his personal representatives,*" not being immediate, but expectant upon a life interest, the rule as to lapse will apply; for in the latter class of cases the testator may merely have intended to provide against the death of the legatee, *between his own decease and that of the tenant for life*. Since, therefore, there is a period to which the gift "*to the executors or administrators or personal representatives*" of the legatee may refer, without interfering with a lapse in the event of his death before the testator, the intention on the part of the testator to provide against that contingency is not sufficiently strong to counteract the general rule; so that if the legatee die during the life of the testator, his legacy will be lost (1 Rop. Leg. 468, 4th Ed.; *Corbyn v. French*, 4 Ves. 435; *Bons v. Cook*, M'Clell. Exch. Ca. 168; 13 Price, 332; *Hutcheson v. Hammond*, 3 Bro. C. C. 128); and the principle which governs the case of legatees of the *corpus* predeceasing one who takes a life interest in the first instance, has been applied to legatees dying before the time of payment, when that is a given time fixed by the will, and when the substitution is made with reference to the first taker's dying before that time. See *Tidwell v. Ariel*, 3 Madd. 403; in which case (amongst several legacies) the testator gave a legacy of 600*l.* to A. and he afterwards directed that his several legacies should be paid by his trustees *at the end of one whole year after his decease, or to their several and respective heirs*. On the death of A. in the lifetime of the testator, it was argued that the direction was inconsistent with a mere personal gift to A., and was, therefore, a substitution of a new legatee in the event of his dying before the testator; but Sir J. Leach, V. C., held that the legacy had lapsed; observing, that if the direction had been that the respective legacies should *at his death* be paid to the legatees or their respective heirs, the inconsistency contended for would have existed: but a payment to the representative *at the end of a year after the testator's death*, if the testator be not then living, was not inconsistent with a personal

gift to the legatee. See also *Humberstone v. Stanton*, 1 V. & B. 385; *Williams v. Jones*, 1 Russ. 517; *Smith v. Oliver*, 11 Beav. 494.

Parol evidence dehors the will is not admissible to prove the intention of the testator, that words of limitation should be taken as words of substitution. Thus in *Maybank v. Brooks*, 1 Bro. C. C. 84, the testator (whose father was indebted to Maybank) left a legacy of 850*l.*, exactly equivalent to the debt, to Maybank, *his executors, administrators or assigns*. Maybank, at the time when the legacy was given, was dead, but of this no notice was taken in the will. The personal representative of Maybank filed a bill for the legacy, insisting that the words in the will, "his executors, administrators or assigns," made the same transmissible; that it was the same as if he had said, "and if he shall be dead, I give the same to such person or persons as shall be his executor, administrator or assign, &c.;" and that he meant the legacy to go to the family of Maybank in payment of the debt. The original debt was not otherwise proved in the cause than by the recital in the will. But the plaintiff proposed to read parol evidence of the testator's knowledge that Maybank was dead, and his intent that the legacy should go to such person as should be his representative. Lord Thurlow, however, rejected the evidence: "The only fact," he observed, "to which evidence is offered is, that the death of Maybank was within the knowledge of the testator. The end to which it is to be read is, that the legacy was meant to be transmissible; that could not be from a legatee who had been dead several years. But it is argued at the bar, that the legacy will amount to this:—'I give to Maybank, whom I know to be dead, if he shall be alive, but if he shall be dead, to his executors and administrators, or (still more absurdly) to his assigns.' It is argued at the bar, that evidence may be read to raise as well as to dissolve an ambiguity in a will; this is good law, for it must be raised by evidence. It has gone so far as to give the legacy to a certain person, where there was no such person in existence as was described in the will, as to 'John a Style,' where there was no such person, but the testator used to call a certain person 'John a Style.' All the cases of the admission of parol evidence are short of this. I must, accordingly, decree the legacy to Maybank to be lapsed."

When a person devises to the uses of the will of another person, there will be a lapse, unless the devisee survive both of the testators. *Culsha v. Cheese*, 7 Hare, 236, 245.

Where there is a devise or bequest to two or more persons as joint-tenants, there will be no lapse unless *all* die in the life of the testator, for the share which any joint-tenant would have taken, had he not died before the testator, will go to the survivor or survivors (*Davis v. Kemp*, Carter, 4, 5; 1 Eq. Ca. Abr. 216; *Buffar v. Bradford*, 2 Atk. 220; *Morley v. Bird*, 3 Ves. 628;

ante, p. 712); and from whatever cause it happens that one of the joint-tenants cannot take, the other will take the whole. See *Dowset v. Sweet*, Amb. 175, where some of the joint-tenants not being able to take, by reason of uncertainty in the description, it was held, that the whole went to one of the joint-tenants to whom that objection did not apply. So in *Humphrey v. Tayleur*, Amb. 136, where a testator bequeathed a residue to A. and B., and by codicil revoked the bequest as to A., it was held, that B. took the whole. See also *Larkins v. Larkins*, 3 Bos. & Pul. 16; *Short d. Gastrell v. Smith*, 4 East, 419.

Where, however, there is a devise or bequest to persons nominatim as tenants in common, on the decease of one of them in the lifetime of the testator, or on failure of the gift to one of them from any cause, there will be no survivorship of his share to the others, but it will lapse. *Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 P. Wms. 489; *Man v. Man*, 2 Stra. 905; *Owen v. Owen*, 1 Atk. 494; *Peat v. Chapman*, 1 Ves. 542; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; 1 L. Cas. Eq. 557; *Creswell v. Cheslyn*, 2 Eden, 123; *S. C.* 3 Bro. P. C. 246, Toml. Ed.

Where, however, a devise or bequest is to persons as a *class*, and the individuals comprising it, can only be ascertained, at the death of the testator, there, although they are made tenants in common, those only who are living at the testator's death will be entitled to the whole, and no lapse will take place, although others may have died in his lifetime. For instance, if property be given to the children, or brothers and sisters of A., equally to be divided between them, the whole will vest in any one or more of the class who may survive the testator (see *Viner v. Francis*, and note, ante, p. 642; *Doe d. Stewart v. Sheffield*, 13 East, 526; *Martin v. Wilson*, 3 Bro. C. C. 324; see *Shuttleworth v. Greaves*, 4 My. & Cr. 35). So where there is a legacy to a person for life, and after his decease to his children, although the parent die in the lifetime of the testator, there will be no lapse, but such of the children as are living at the death of the testator will take the whole. *Lee v. Pain*, 4 Hare, 250; sed vide *Allen v. Callow*, 3 Ves. 289; *Ackerman v. Burrows*, 3 V. & B. 54.

It seems the result will be the same in the case of a bequest to next of kin or relations. *Ham's Trusts*, 2 Sim. N. S. 106, 111; *Bridge v. Abbot*, 3 Bro. C. C. 224; *Vaux v. Henderson*, 1 J. & W. 388, n.

Upon the same principle it has been held, that where it appears to have been the testator's intention to make a gift to executors as a *class*, the whole subject of it will vest in the persons composing the class at the death of the testator, though the gift be to them as tenants in common (*Knight v. Gould*, 2 My. & K. 295). Where, however, it is made to them as *individuals* a lapse will take place as to the share of any of them who has died before that

period. See *Barber v. Barber*, 3 My. & Cr. 688. There the testator gave property to A., B., C. and D., "to be divided betwixt them in equal proportions, and to their heirs for ever, which last-mentioned four persons I also appoint as my executors. One of the persons named as executors renounced probate and refused to act. It was held by Lord Cottenham, C., that his share in the property was a lapsed legacy, and did not devolve upon the other three persons named with him as executors. "This," said his Lordship, "as all other questions of construction, must depend upon the intention. A gift to a class implies an intention to benefit those who constitute the class, and to exclude all others; but a gift to individuals described by their several names and descriptions, though they may together constitute a class, implies an intention to benefit the individuals named. In a gift to a class you look to the description and inquire what individuals answer to it; and those who do answer to it are the legatees described. But if the parties to whom the legacy is given be not described as a class, but by their individual names and additions, though together constituting a class, those who may constitute the class at any particular time may not, in any respect, correspond with the description of the individuals named as legatees. If a testator give a legacy to be divided amongst the children of A. at a particular time, those who constitute the class at the time will take; but if the legacy be given to B., C. and D., children of A., as tenants in common, and one die before the testator, the survivors will not take the share of the deceased child. The question must be, was the intention to bequeath to those who might, at the time, constitute the class, or to certain individuals who, it was supposed, would constitute it?" 3 My. & Cr. 697; see also *Page v. Page*, 2 P. Wms. 489; *Bain v. Lescher*, 11 Sim. 397.

Where a legacy is given to a person for life, with remainder over to another legatee, if the tenant for life dies before the testator, the remainder over takes effect upon the death of the testator, and it is immaterial that the tenant for life has a power of appointment. *Hardwick v. Thurston*, 4 Russ. 380; *Chatteris v. Young*, 6 Madd. 30; *Edwards v. Salomay*, 2 De Gex & Sm. 248; 2 Ph. 625.

So where there is a bequest over in case of the death of the legatee before a certain period, or before the happening of some event, although he dies during the testator's life before the period specified, or before the happening of the event, there will be no lapse, and the bequest over will take effect. The leading case upon this subject is *Willing v. Baine* (3 P. Wms. 113). There a testator bequeathed 200*l.* apiece to his children, payable at their respective ages of twenty-one years; and if any of them died before their age of twenty-one, the legacy so given was to go to the surviving children. One of the children died in the lifetime of the testator and before twenty-

one, and it was held that the legacy given to him went to the surviving children. See also *Miller v. Warren*, 2 Vern. 207; *Ledsome v. Hickman*, 2 Vern. 611; *Walker v. Main*, 1 J. & W. 1; *Humphreys v. Howes*, 1 Russ. & My. 639; *Mackinnon v. Peach*, 2 Keen, 555.

But where the legatee has survived the specified period or event, and the contingency upon which the legacy is given over has not happened, the legacy will lapse by the death of the legatee in the lifetime of the testator. Thus in *Humberstone v. Stanton*, 1 V. & B. 385, there was a bequest after the decease of his wife to the testator's son Joseph, on his completing and fully accomplishing his apprenticeship, with the dividends in the mean time for maintenance; and *in case he should die before he accomplished his apprenticeship*, then and in such case to the other children. The legatee *having completed his apprenticeship*, died in the testator's lifetime; it was held by Sir W. Grant, M. R., that the legacy lapsed. "It is contended," said his Honor, "that though the legatee has survived the specified period or event, and though the contingency upon which alone the legacy is given over, has not happened, still the bequest over is to take effect. If Joseph, having completed his apprenticeship, had survived the testator, it is clear that the legacy would have vested in him absolutely; for its being given from and immediately after the death of the person entitled for life would not have suspended the vesting. The event which was to bar the claim of the brothers and sisters has happened; as he completed his apprenticeship before his death. His death in the testator's life produces lapse; and lets in the residuary legatees.

"There are two cases decisive upon this, *Calthorpe v. Gough* (3 Bro. C. C. 394, n.; 7 T. R. 707, n.); and *Doo v. Brabant* (3 Bro. C. C. 393; 4 T. R. 706). In the former 10,000*l.* was bequeathed in trust for the separate use of Lady Gough, and in case she should die in the life of her husband, according to her appointment, and for want of appointment; among the children; but if she should survive her husband, then the whole to her. The event in which the children were to take did not happen, that in which she was to take absolutely, did; but she died in the testator's life; and it was determined to be a case of lapse. In *Doo v. Brabant*, a legacy was bequeathed in trust for Sarah Counsell, until she should attain twenty-one, and then to transfer to her, in case she should die under twenty-one leaving children, in trust for her children; and if she should die under twenty-one without leaving a child, or children, or, being such, they should all die under twenty-one, over. She attained twenty-one; married; and had children; but died before the testatrix, leaving two infant children surviving her. Lord Thurlow, according to Brown, seems to disapprove of *Calthorpe v. Gough*; and to incline to the opinion, that upon *Jones v.*

Westcomb, and other cases of that class, the children should be let in to take; but sent a case to the Court of King's Bench; who held with great clearness, that the children could take nothing. Lord Kenyon says, 'If this event had occurred to the testatrix, most probably she would have provided for it, and given the money to the grandchildren; but, as she has not done so, we cannot make a will for her.' (See ante, p. 710.) Lord Alvanley had made a similar observation in *Calthorpe v. Gough*. Here, the testator has left his actual intention at least as much unexplained as in those cases. Therefore, I must abide by the words; and according to them, there is no foundation for the claim set up by the defendants." See also *Miller v. Faure*, 1 Ves. 85; *Williams v. Chitty*, 3 Ves. 545; *Williams v. Jones*, 1 Russ. 517; *Baker v. Hanbury*, 3 Russ. 340; *Dichen v. Clarke*, 2 Y. & Coll. Exch. Ca. 572; *Earl of Newburgh v. Eyre*, 4 Russ. 454.

Where a bequest is made to a person in trust for another, it will not lapse by reason of the death of the trustee in the lifetime of the testator. This point was decided by the Master of the Rolls, when the principal case came before him (see *S. C.* 2 Vern. 520), and his decision upon that point was not found fault with before the Lord Keeper. See also *Eales v. England*, Prec. Ch. 200; 2 Vern. 468; *Oke v. Heath*, 1 Ves. 140; *Inchiquin v. French*, 1 Cox, 1.

In the converse case of the death, in the life of the testator, of a person entitled under his will to the beneficial interest of property, whereof the legal interest is thereby devised to trustees, there will be no lapse of the legal estate, which will pass by the will. *Doe d. Shelley v. Edlin*, 4 Ad. & Ell. 582.

A charge, either of a gross or annual sum upon devised property, will not lapse by the death of the devisee (*Wigg v. Wigg*, 1 Atk. 382; *Hills v. Worley*, 2 Atk. 605; *Oke v. Heath*, 1 Ves. 135); but the charge will lapse by the death of the person, in whose favour it is made, before the death of the testator. As to whether it lapses in favour of the devisee or heir-at-law, see *Bland v. Wilkins*, 1 Bro. C. C. 61, n.; *Tregonwell v. Sydenham*, 3 Dow, 210; *Cooke v. Stationers' Company*, 3 My. & K. 264; *Grosvenor v. Hallan*, 2 S. & S. 498; *Henchman v. Attorney-General*, 2 S. & S. 498; *Jackson v. Hurlock*, Amb. 487; *Barrington v. Hereford*, 1 Bro. C. C. 61, cited; *Baker v. Hall*, 12 Ves. 497; *Re Cooper's Trusts*, 23 L. J., Ch., 25; 17 Jur. 1087.

The law relating to lapse has been materially altered by the Wills Act (1 Vict. c. 26), which enacts, "that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise

incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." Sect. 25.

The next provision, which relates to estates tail, is as follows: "that where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." Sect. 32.

Lastly, with regard to gifts to the children or other issue of the testator, it is enacted, "that where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." Sect. 33. See *Winter v. Winter*, 5 Hare, 314; *Mower v. Orr*, 7 Hare, 473.

It has been held that the 33rd section does not apply to gifts under a power of appointment, so as to prevent a lapse upon the death of a donee, where there is a gift over in default of appointment (*Griffiths v. Gale*, 12 Sim. 327, 354); nor to gifts to a class; so that where a legacy is given to children as a class, the representatives of those who die, during the life of the testator, will take nothing. *Olney v. Bates*, 3 Drew. 319, 323.

DOE *d.* SIMON HISCOCKS *v.* JOHN HISCOCKS.

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Exch. of Pleas, Trinity Term, 2 Vict. 1839.

[REPORTED 5 MEES. & WELS. 363.]

EXTRINSIC EVIDENCE IN CONSTRUING WILLS.—*A testator devised lands to his son John H. for life; and on his decease to the testator's grandson John H., eldest son of the said John H., for life; and on his decease to the first son of the body of his grandson John H. in tail male, with other remainders over. At the time of making the will the testator's son John H. had been twice married; by his first wife he had one son, Simon, by his second wife an eldest son, John, and other younger children, sons and daughters:—Held, that evidence of the instructions given by the testator for his will, and of his declarations, was not admissible to show which of these two grandsons was intended by the description in the will. Quære, whether the devise was not void for uncertainty.*

EJECTMENT for lands in the county of Devon. At the trial before Bosanquet, J., at the Devonshire Spring Assizes, 1838, it appeared that the lessor of the plaintiff claimed the premises in dispute under the will of Simon Hiscocks, the grandfather of both the lessor of the plaintiff and the defendant, dated 7th of July, 1822, whereby the testator devised the premises in question to his son John Hiscocks, to hold the same unto him, his said son John Hiscocks, and his assigns for and during the term of his natural life; and immediately on the decease of the said John Hiscocks, the testator gave and devised all and singular the said last described hereditaments and premises unto his grandson John Hiscocks, *eldest son* of the said John Hiscocks, and

his assigns, for and during the term of his natural life; and immediately on his decease the testator gave and devised the same hereditaments and premises unto the first son of the body of his said grandson John Hiscocks and the heirs male of his body lawfully issuing; with remainders over. At the time of making the will John Hiscocks, the son of the testator, had issue, by a first marriage, Simon Hiscocks, the lessor of the plaintiff; and, by a second marriage, John Hiscocks, the defendant, and several other younger children, sons and daughters. It appeared also, that the estate had come to the testator from the father of John Hiscocks, the son's, second wife. Under these circumstances, neither of the parties in the cause answering fully the description given in the will (inasmuch as the lessor of the plaintiff, though the eldest son of John Hiscocks the elder, bore the name of Simon, not John; whereas the defendant, though his name was John, was only his father's eldest son by a second marriage), the plaintiff's counsel proposed to give in evidence the instructions given by the testator for his will, and also declarations made by him after its execution, to show that the lessor of the plaintiff was really the person in his contemplation as the object of his bounty at the time of making the will. This evidence was objected to by the defendant's counsel, but received by the learned Judge, leave being reserved to the defendant to move to enter a nonsuit, if the Court should think it inadmissible: and evidence of this nature having been adduced on both sides, the jury found a verdict for the plaintiff.

In the following term, Erle obtained a rule nisi for a nonsuit or a new trial, on the ground that this evidence was improperly received; against which, in last Michaelmas term, Crowder and Bere showed cause (a), and contended that this was a case of latent ambiguity which did not arise until the state of the family was proved, and it appeared that the testator had made a mistake in the name of the intended devisee; and the case, therefore, fell within the established principle, that a latent ambiguity, where no uncertainty appeared on the face of the will itself, might be holpen by extrinsic evidence; and they cited or referred to the following authorities:—*Cheyney's Case*, 5 Co. 68; *Couden v. Clarke*, Hob. 32; *Jones v. Newman*, 1 W. Bl. 60; *Day*

(a) The subject is so fully discussed in the judgment of the Court, that it is not considered necessary to report the arguments, which ran to great length, in detail.

v. *Trig*, 1 P. Wms. 286; *Beaumont v. Fell*, 2 P. Wms. 141; *Hampshire v. Peirce*, 2 Ves. sen. 216; *Dowset v. Sweet*, Ambl. 175; *Bradwin v. Harper*, Ib. 374; *Thomas v. Thomas*, 6 T. R. 671; *Price v. Page*, 4 Ves. 680; *Smith v. Coney*, 6 Ves. 42; *Careless v. Careless*, 19 Ves. 604; 1 Meriv. 384; *Doe d. Oxenden v. Chichester*, 3 Taunt. 147; *Goodtitle v. Southern*, 1 Mau. & Sel. 299; *Doe d. Le Chevalier v. Huthwaite*, 3 B. & Ald. 632; *Doe d. Morgan v. Morgan*, 1 C. & M. 235; *Richardson v. Watson*, 4 B. & Ad. 787; 1 Nev. & Man. 567; *Miller v. Travers*, 8 Bing. 244; 1 M. & Scott, 342, and *Doe d. Gord v. Needs*, 2 Mees. & W. 129.

Erle and *Butt*, contra, argued, first, that as soon as evidence of the state of the family had been given, all the words of the devise were capable of an application which the judge ought then to have made without receiving further parol evidence, viz. by construing the words "eldest son of the said John Hiscocks," to mean the eldest son by the second venter; in support of which argument they cited *Steede v. Berrier*, 1 Freem. 292; *Foster v. Ramsay*, 8 Vin. 310, pl. 9; 2 Sid. 149; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Beachcroft v. Beachcroft*, 1 Madd. 430; *Gill v. Shelley*, 2 Russ. & M. 336; *Frazer v. Pigott*, 1 Younge, 354; *Lewis v. Lewellin*, 1 Turn. & Russ. 104; and *Davis v. Williams*, 1 Ad. & Ell. 588; 3 Nev. & Man. 821.

Secondly, that the evidence of the testator's intention was not admissible in this case, because it went to show an intention contradictory of one which was plainly expressed in the will, and was capable of an application; or, if not applicable by inquiry into the surrounding circumstances, that the devise was altogether void. In this part of the argument, besides the cases referred to by the plaintiff's counsel, the following were mentioned:—*Parsons v. Parsons*, 1 Ves. jun. 266, n.; *Baylis v. Attorney-General*, 2 Atk. 239; *Herbert v. Reid*, 16 Ves. 489.

Thirdly, that at all events the declarations of the testator, being made subsequently to the will, could not be received: *Doe d. Morgan v. Morgan*; *Harris v. Bishop of Lincoln*, 2 P. Wms. 135; *Rachfield v. Careless*, Ib. 158.

Cur. adv. vult.

The judgment of the Court was now delivered by

Lord *Abinger*, C. B.—This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death to his grandson Henry Hiscocks in tail male, and making as to certain other estates, an exactly similar provision in favour of his son John for life; then, after his death, the testator devises those estates “to my grandson, John Hiscocks, eldest son of the said John Hiscocks.” It is on this devise that the question wholly turns.

In fact, John Hiscocks the father had been twice married; by his first wife he had Simon the lessor of the plaintiff, his eldest son: the eldest son of the second marriage was John Hiscocks the defendant. The devise, therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son.

The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the county of Devon, 1838, and that learned Judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff a rule has been obtained for a nonsuit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial.

It must be admitted that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his

words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprized of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence to enable us to understand the meaning and application of his words.

Again,—the testator may have habitually called certain persons or things by peculiar names by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will.

But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous.

Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express.

Thus, if a testator devise his manor of S. to A. B.(b), and has two manors of North S. and South S., it being clear he means to devise

(b) See *Douglas v. Fellows*, 1 Kay, 120.

one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls "an equivocation;" i. e., the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction.

It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will.

It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe v. Huthwaite* and *Bradshaw v. Bradshaw*, the only thing decided was, that, in a case like the present, *some* parol evidence was admissible. There, however, it was not decided, that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have a full effect. Thus, again, in *Cheyney's Case*, and in *Couden v. Clarke*, "the averment is taken" in order to show which of two persons, *both equally described* within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe d. Morgan v. Morgan*, and *Doe d. Gord v. Needs*, both in this Court, are to the same effect. So, in the case of *Jones v. Newman*, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of there being two J. C.s, strangers to each other, and then the decision

was right, it being a mere case of what Lord Bacon calls equivocation.

The cases of *Price v. Page*, *Still v. Hoste*, 6 Madd. 192, and *Careless v. Careless*, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate), equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price v. Page*, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood v. Mildmay*, 3 Ves. jun. 306, evidence of instructions for the will was received. That case was doubted in *Miller v. Travers*; but perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal, in *Miller v. Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire v. Peirce*, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, "the four children of my niece Bamfield," she meant the four children by the second marriage. It may well be doubted, whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont v. Fell*, though somewhat doubtful, can be reconciled with two principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardly by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant

that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardly was also received; and the same evidence was received at Nisi Prius, in *Thomas v. Thomas*, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in *Miller v. Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardly and Elinor Evans, it might surely equally be adduced to prove that, by "the county of Limerick," a testator meant "the county of Clare." Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller v. Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial.

Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe v. Huthwaite*, *Bradshaw v. Bradshaw*, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty.

Rule absolute for a new trial.

Doe d. Hiscocks v. Hiscocks is generally referred to as the leading case wherein the principles, upon which extrinsic evidence is admissible in explanation of a will, were thoroughly discussed and correctly applied by Lord Abinger, C. B., in delivering the judgment of the Court of Exchequer. 2 Taylor on Evidence, 948.

"The object," said his Lordship, "in all cases is to discover the intention of the testator.

"The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words."

In collecting the intention of the testator from the will itself, we must bear in mind the first proposition laid down in Sir James Wigram's work upon this subject, p. 15: viz.—that "A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptance (1 Doug. 341; 2 Ball & B. 204, 506; 5 B. & C. 77, 82; *Crowder v. Stone*, 3 Russ. 223; *Mostyn v. Mostyn*, 5 H. L. Cas. 155; *Douglas v. Fellows*, Kay, 114; *Shore v. Wilson*, 9 C. & F. 355), unless from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed."

Thus under the description of "children" it has been held that grandchildren were entitled, when it appeared from the context that the former word was to receive a larger construction than what it bears in its primary and usual sense. *Reeves v. Brymer*, 4 Ves. 698; *Radcliffe v. Buckley*, 10 Ves. 201. See also *Winterton v. Crawford*, 1 Russ. & My. 407; *Dent v. Pepys*, 6 Madd. 350, and 2 Eden, 196, n. (a), and the cases there cited.

No evidence will be admitted to add to the contents of a will by showing what was the testator's intention. Thus the evidence of a person who drew a will has been rejected where it was attempted to be shown that he had instructions to release by the will the bond debt of one of two residuary legatees and executors, but neglected to do so under an erroneous impression that the debt was extinguished by the appointment of the debtor to be executor. *Brown v. Selwin*, Ca. t. Talb. 240; *S. C.* 3 Bro. P. C. 607, Toml. Ed.; and see *Lord Walpole v. Earl of Cholmondeley*, 7 T. R. 138.

Upon the same principle in the case of the *Earl of Newburgh v. The Countess of Newburgh*, 5 Madd. 364, heard first by Sir J. Leach, V. C., and afterwards by the House of Lords on appeal (1 M. & Scott, 352), Lady Newburgh contended that the omission of the word "Gloucester" in the will of the late Lord Newburgh proceeded upon a mere mistake, and was contrary to the intention of the testator, at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the

testator intended to devise to her an estate for life, as well in the estate in Gloucester, which was not inserted in the will as that in the county of Sussex, which was mentioned therein. The question, whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will, and entitling Lady Newburgh to the Gloucester estate, as if the word "Gloucester" had been inserted in the will, was submitted to the Judges; and Lord Chief Justice Abbot declared it to be the unanimous opinion of those who had heard the argument that it could not. So in *Langston v. Langston*, 8 Bligh, N. S. 167, evidence to show that a person copying out a will from the draft had omitted a line, was held inadmissible. See also *Vernon's Case*, 4 Co. 4; *Chyney's Case*, 5 Co. 68; *Lawrence v. Dodwell*, 1 Id. Raym. 438; *Bertie v. Falkland*, 1 Salk. 232; *Towers v. Moor*, 2 Vern. 98; *Bennet v. Davis*, 2 P. Wms. 316; *Parsons v. Lanos*, 1 Ves. 189; *Ulrich v. Litchfield*, 2 Atk. 374.

It seems, however, that where a clause has been erroneously introduced into a will contrary to the testator's intention, an issue *devisavit vel non* may be directed, upon which evidence may be given of the mistake. Thus when the before-mentioned case of *Earl of Newburgh v. Countess of Newburgh* came before Sir John Leach, V. C., upon a rehearing (5 Madd. 367) it was suggested, as the result of the conveyancer's evidence, that there was *no omission in the will*, but that the error was owing to the introduction of a passage which he had first written, and afterwards struck through with his pen, having been copied by mistake in the fair will; and it was contended there ought, therefore, to be an issue to try whether those words so introduced by mistake were part of the will. The Vice-Chancellor thought that if such a case had been originally made, the plaintiff would have been entitled to an issue; but that, such case being in direct opposition to the allegations upon the record, he could not entertain it. See also *Hippesley v. Homer*, T. & R. 48, n.; *Lord Trimlestown v. D'Alton*, 1 Dow & C. 85; *Powell v. Mouchett*, 6 Madd. 216; *Lord Guillamore v. O'Grady*, 2 J. & L. 210.

Although parol evidence will not be received to explain the contents of a will, it is admissible to show, that the signature of the testator has been obtained by fraud; as, for instance, where he executes a will upon a false representation that it is the same as one he had formerly executed (*Doe d. Small v. Allen*, 8 T. R. 147). So where a person makes a promise that if an estate be devised to him he will pay a sum of money to the heir, parol evidence is admissible to prove the promise, and the devisee will in equity be held a trustee of the money for the heir. *Strickland v. Strickland*, 9 Ves. 519; *Drakeford v. Wilks*, 3 Atk. 539; *Oldham v. Litchfield*, 2 Vern. 506; see also *Doe v. Hardy*, 1 Moo. & R. 525.

Parol evidence is also admissible in other cases of fraud, so as to attach a trust to property given by will. Thus if a testator should communicate

to a devisee his intention of charging a legacy on his estate, and the devisee should tell him that it is unnecessary, as he will pay it; the gift of the legacy being thus prevented, upon the fraud being proved by parol evidence, the devisee will be charged with its payment. So where a person procures a testator to make a new will, appointing him executor, and agrees to hold the property in trust for the use of the intended legatee, he will, upon these facts being proved, be held a trustee for the latter, upon the like ground of fraud. See *Goss v. Tracy*, 1 P. Wms. 288; 2 Vern. 700; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v. Litchfield*, 2 Vern. 506; *Reech v. Ken-nigate*, Amb. 67; *Devenish v. Baines*, Prec. Ch. 3; *Drakeford v. Wilks*, 3 Atk. 539; *Barrow v. Greenough*, 3 Ves. 152; *Mestaer v. Gillespie*, 11 Ves. 638; *Chamberlain v. Agar*, 2 V. & B. 262; *Strickland v. Aldridge*, 9 Ves. 519.

As to the admission of parol evidence to rebut resulting and presumptive trusts, see *Ackroyd v. Smithson*, 1 L. Cas. Eq. 557; *Dyer v. Dyer*, Ib. 138; *Hookey v. Hatton*, 2 Ib. 246; *Ex parte Pye*, Ib. 262, and the notes.

No evidence will be admissible to show that words are to be used in any popular or secondary sense, if, by being construed in their strict and primary sense, they are *sensible with reference to extrinsic circumstances*. Wigram on Extrin. Evid. 17.

Thus the word "children" will, in the absence of any explanatory terms in the context, be construed to mean *legitimate children*; and where a person has legitimate children, no evidence will be admissible to show that the testator intended illegitimate to take with legitimate children. In such a case the words made use of by the testator are sensible with reference to extrinsic circumstances; that is to say, they have objects to which they are applicable. *Wilkinson v. Adam*, 1 V. & B. 422; *Mortimer v. West*, 3 Russ. 370; *Bagley v. Mollard*, 1 Russ. & My. 581.

Delmare v. Robello, 1 Ves. jun. 412, proceeds upon the same principle: there a testator made a bequest to all the children of his two sisters Reyne and Estrella, and died leaving three sisters, Reyne, who was never married, but, before the date of the will, became a nun, under the name of Maria Hieronyma; Estrella, who was married; and Rebecca, who was also married and had several children; the two latter both lived at Leghorn. A bill was filed by Rebecca's children, claiming, upon the ground that the testator intended Rebecca when he named Reyne, and in support of it, they offered parol evidence of the circumstances, and one witness swore that the testator had said, when he made his will, that he meant and was about to provide for the children of his sister at Leghorn. The bill, however, was dismissed. So, also, in *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57, where the testator

had three brothers, Thomas, Richard and Matthew, each of whom had a son called Simon, and he devised as follows: viz.—“unto Matthew Westlake my brother, and to Simon Westlake my brother’s son,” it was held by the Court of Queen’s Bench, that upon the face of the will, it was clear that the nephew intended was the son of Matthew, and that there was no latent ambiguity, so as to let in oral declarations made by the testator as to his intention. See also *Andrews v. Dobson*, 1 Cox, 425; *Holmes v. Custance*, 12 Ves. 279; *Wilson v. Squire*, 1 Y. & Coll. C. C. 654.

In *Doe d. Chichester v. Oxenden*, 3 Taunt. 147, a testator devised his “estate of Ashton,” to Oxenden. It was held by the Court of Common Pleas, that only his estate locally situated at Ashton passed by the will, and that evidence was not admissible to show, that the testator was accustomed to include in the term of his “Ashton estate,” property lying in several adjoining parishes, and therefore intended to pass the whole by his will. Sir James Mansfield, C. J., observed, that the result of the decision would give the will an effective operation, and therein the case differed from all others in which such evidence had been received, for in them, without it, the devise would have had *no operation*; and it was, he said, safer not to go beyond the line. This decision was affirmed by the House of Lords, 4 Dow, 65. In this case it will be observed, that the words made use of by the testator were sensible with reference to extrinsic circumstances, that is to say, they had a subject-matter to which they were applicable. See also *Doe d. Browne v. Greening*, 3 Mau. & Sel. 171; *Doe d. Tyrrell v. Lyford*, 4 Mau. & Sel. 550; *Doe v. Langton*, 2 B. & Ad. 680; *Doe d. Preedy v. Holton*, 5 Nev. & Man. 391; *S. C.* 4 Ad. & Ell. 76; *Doe d. Ashforth v. Bower*, 3 B. & Ad. 453; *Doe d. Smith v. Galloway*, 5 B. & Ad. 43; *Strode v. Russel*, 2 Vern. 621; *Pocock v. The Bishop of Lincoln*, 3 Brod. & Bing. 27.

The context, however, may show that the words are not to be taken in their primary meaning. See *Doe d. Beach v. Earl of Jersey*, 1 B. & Ald. 550; 3 B. & C. 870.

Thus although the word “child,” taken simpliciter, means a legitimate child only, nevertheless words may be used by the testator by which that sense may be controlled, and the context may show that the word is intended to be used in a secondary sense, viz. as meaning an illegitimate child. Thus in *Evans v. Davies* (7 Hare, 498), a testator bequeathed legacies to each of “his children, Martha, Sarah, Joseph, William and Noah,” appointing his wife their guardian, and directing the application of the interest for their maintenance. He then directed that the remainder of his personal estate, and the residue of the proceeds of certain real estates, should be divided between all his children of his first and second marriages. The testator

then charged other parts of his real estates with certain annual payments, and directed that the remainder of the rents and profits should be divided among all his "said children." The testator then directed, that, in case one or more of the children by his second wife should die without issue under twenty-one, their shares and legacies should go between his second wife and such of "his children" by her as should be living, and he gave the residue of his estate to all and every of his *children*. It was held by Sir James Wigram, V. C., that Sarah, who was a child by the second wife before marriage, was within the description of "children" contained in the will, and entitled to share with the legitimate children of the testator in the residuary gifts. "There is no doubt," said his Honor, "as to the general rule, that if the word 'children' be so used by the testator, that it can be possibly understood to mean legitimate children only, it will not be extended to others. If, however, the will plainly refers to given individuals, and it be clear that they are described by the word 'children,' the Court is not precluded by any of the received rules of law from giving effect to the intentions of the testator. There cannot be any doubt in this case of the testator's intention to include Sarah amongst the children to whom he has given the residue of his property. It appears to me that, in order to prevent Sarah from taking, I must give to the word 'children' in this will a meaning contrary to the language of the testator." See also *In re Connor*, 2 J. & L. 456.

Where, however, as is laid down in the principal case, the words of the devise in their primary sense, when applied to the circumstances of the family and the property of the testator, make the devise insensible, collateral facts may be resorted to, in order to show that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have full effect.

The word "child" has often been construed in two different senses in the same instrument. If a gift were made to the children of A. now living, if A. had none but illegitimate children, and they had acquired by reputation the character of his children, they would no doubt take under the gift; and a bequest by the same will to the after-born children of A. would be satisfied by construing the word "child" in its proper sense, and in the latter bequest illegitimate children would take no interest. *Dover v. Alexander*, 2 Hare, 281, 282; and see *Fraser v. Pigott*, You. 354.

Evidence is admissible to show the meaning of a will, if it be written in a foreign language or in a cipher. Wigram, *Extrins. Ev.* 48; see *Masters v. Masters*, 1 P. Wms. 421; *Norman v. Morrell*, 4 Ves. 769. So if a person makes use of expressions peculiar to a particular trade or calling, persons acquainted with the meaning of such expressions may be called in to give

evidence so as to enable the Court to put a correct interpretation upon them. *Attorney-General v. The Cast Plate Glass Company*, 1 Anst. 39; *Goblet v. Beechey*, 3 Sim. 24; *S. C. Wigram on Extrins. Ev.* 185; 2 Russ. & My. 624; *Smith v. Wilson*, 3 B. & Ad. 728; *Richardson v. Watson*, 4 B. & Ad. 787; *The King v. Mashiter*, 6 Ad. & Ell. 153.

So, likewise, as is laid down by the Chief Baron in the principal case, a testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will was written in cipher or in a foreign language. The habits of the testator in these particulars must be received only as evidence to explain the meaning of his will. See also *Lee v. Pain*, 4 Hare, 251.

Evidence is admissible to show the facts and circumstances respecting persons or property to which the will relates. For as is well laid down by the learned Chief Baron in the principal case, "as the testator's words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprized of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors." See Wigr. Extrins. Ev. p. 51, Prop. 5.

Even where an object is correctly described in a will, some evidence is requisite to show that it is what was meant to be given by the testator. Thus, as observed by Coleridge, J., "if the word Blackacre be used, there must be evidence to show that the field in question is Blackacre." *Doe d. Preedy v. Holtom*, 4 Ad. & Ell. 82: see also *Doe d. Clements v. Collins*, 2 T. R. 498; *Goodtitle v. Southern*, 1 Mau. & Sel. 290; *Buck d. Whalley v. Nurton*, 1 Bos. & Pul. 53; *Sandford v. Raihes*, 1 Mer. 646; *Ongley v. Chambers*, 8 J. B. Moore, 665; 1 Bing. 483; *Man v. Ricketts*, 7 Beav. 93; 1 H. L. Cas. 472, nom. *Ricketts v. Turquand*.

Again, where the testator has no lands which precisely answer the description he has given of them, by parol evidence the devise may be extended to lands of a somewhat different locality. *Doe v. Roberts*, 5 B. & Ald. 407; *Baddeley v. Gingell*, 1 Exch. 319. See, however, and consider *Miller v. Travers*, 1 M. & Scott, 342; 8 Bing. 244.

Upon the same principle, extrinsic facts and circumstances may show that the word "child" could not have been used in its only proper sense.

Thus in *Gill v. Shelley* (cited 2 Hare, 283), where a testatrix directed that the residue of her estate should be divided amongst certain classes of persons mentioned in her will, and added, "amongst whom I include the children of the late Mary Gladman. Mary Gladman was then dead, having left two children only, one legitimate and the other illegitimate, so that the plural term "children" could not be satisfied by giving the property to the single legitimate child; and Sir John Leach, M. R., held that both of the children were entitled. The express ground was, that the words were not capable of being satisfied without a departure from their primary sense. *S. C.* 2 Russ. & My. 336; sed vide *Hart v. Durand*, 3 Anst. 684; and *Swaine v. Kennerley*, 1 V. & B. 469; which, if not overruled, seem not to be supportable upon principle.

Upon the same principle, where there is a gift to the children "now living" of A., who at that time had only illegitimate children (*Blundell v. Dunn*, cited 1 Madd. 433), or to "the children of the late B.," then dead, who had only left illegitimate children (*Lord Woodhouselee v. Dalrymple*, 2 Mer. 419), such illegitimate children will take.

Where there is a latent ambiguity with reference to any person or thing intended by the testator, that is to say, where the description used by the testator is indifferently applicable to more than one person or thing, evidence is admissible to show to which person or thing the description is intended to apply. "For example where a testator devises his estate of Blackacre and has two estates of Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which of them the testator intended. And so, also, if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received." Per Gibbs, C. J., 4 Dow, 93; *Lord Cheney's Case*, 5 Co. 68 b; *Jones v. Newman*, Sir W. Black. 60; *Careless v. Careless*, 1 Mer. 384; *Doe d. Morgan v. Morgan*, 1 Crompt. & M. 235; *Doe d. Gord v. Needs*, 2 Mees. & W. 129; *Doe d. Allen v. Allen*, 12 Ad. & Ell. 451. Where a testator having several brothers or sons makes a bequest "to my brother" or "my son" it seems that parol evidence will be admissible to point out which son or brother he meant (1 Jarm. Wills, 360): but it is clear that if no parol evidence were given in such cases the bequest would fail on account of its ambiguity (*Dowset v. Sweet*, Amb. 175; *Doe d. Hayter v. Joinville*,

3 East, 172). But extrinsic evidence will not be admissible if it appears upon the face of the will itself, that a particular description applies with greater propriety to one person than another. *Doe d. Westlake v. Westlake*, 4 B. & Ald. 57; *Douglas v. Fellows*, Kay, 114.

It would seem upon the same principle, that where a description is partly applicable to several persons, and is partly either applicable to no person at all or a mere blank, parol evidence will be admissible. See *Careless v. Careless*, 1 Mer. 384; *Price v. Page*, 4 Ves. 679; *Still v. Hoste*, 6 Mad. 192; these cases are commented upon by the Chief Baron in the principal case.

Where a description in a will is applicable partly to one person and partly to another, evidence will not be admissible to show which person was intended by the testator. This was decided in the principal case, after an elaborate examination of the authorities by Lord Abinger, C. B., some of which probably might have justified him in arriving at a different conclusion. See also *Blundell v. Gladstone*, 11 Sim. 467; 1 Ph. 279; 1 H. L. Cas. 778.

If evidence of the declarations of the testator is admissible to show his intention, where the description in the will is unambiguous with reference to several objects, it is not essential that such declarations should be contemporaneous with the execution of the will; as they will not be rejected though made before or subsequent to the will; their weight, however, depends upon the time and circumstances, at or under which they were made. *Langham v. Sanford*, 19 Ves. 649; *Blundell v. Gladstone*, 11 Sim. 467, 470; 1 Ph. 279, 282; S. C. 1 H. L. Ca. 778, nom. *Camoy's v. Blundell*; *Thomson v. Hempenstall*, 13 Jur. 814; *Bernasconi v. Atkinson*, 23 L. J., Ch., 184; 17 Jur. 128; sed vide, *In re Blackman*, 16 Beav. 377.

Evidence will not be admissible as is laid down in the principal case, where no part of the description is applicable either to a person (*Hampshire v. Pierce*, 2 Ves. 218) or to an estate. See the leading case of *Miller v. Travers*, 8 Bing. 244. Where a person devised all his real estates in the county of Limerick and in the city of Limerick, it appeared that the testator had no real estates in the county of Limerick at the time of making his will, but he had a small estate in the city of Limerick, and a large estate in the county of Clare; it was held, however, that evidence was not admissible to show that the testator intended to devise the estates in the county of Clare, and that the word Limerick had been used by mistake for the word "Clare." In each of the cases of *Masters v. Masters* (1 P. Wms. 425) and *Beaumont v. Fell* (2 P. Wms. 141; 2 Eq. Ca. Abr. 366, pl. 8), commented on in the principal case, the name was wholly wrong; but parol

evidence was admitted; it is however doubtful whether they can be considered as authorities.

There is no authority for filling up a blank left for the name of a person in a will by parol evidence (*Doe v. Needs*, 2 Mees. & W. 130); and where a legacy was left to Lady —, it was held by Lord Thurlow, that the blank could not be supplied by evidence (*Hunt v. Hort*, 3 Bro. C. C. 311; see also 1 M. & Scott, 351); but where a surname only has been given leaving a blank for the christian name (*Price v. Page*, 4 Ves. 680), or the initials of a name only have been made use of, as a bequest to Mr. and Mrs. G. (*Abbot v. Massie*, 3 Ves. 148), evidence has been held admissible to show whom the testator intended to designate.

Where, however, a testator's meaning cannot be ascertained from the words of the will, and evidence is not admissible under any of the circumstances before mentioned, the will will be void for uncertainty.

FORBES v. MOFFATT.

MOFFATT v. HAMMOND.



Feb. 19th, August 9th, 1811. Rolls.

[REPORTED 18 VES. 384.]

EXTINGUISHMENT—MERGER.]—*Mortgage not merged by union with the fee: the actual intention, not established by the acts of the party, presumed from the greater advantage against merger in favour of the personal representative.*

A person becoming entitled to an estate, subject to a charge for his own benefit, may keep up the charge. Distinction upon this subject in Law and Equity; the latter sometimes holding a charge extinguished where it would subsist at law, and sometimes preserving it where at law it would be merged; depending on the intention, actual or presumed, of the person in whom the interests are united. Where, as in most instances, it is, with reference to the party himself, of no sort of use to have a charge on his own estate, it will sink without some act by him to keep it on foot.

Entry of the devisee, having also a mortgage, presumed to be as devisee, if no trace appears of any of the steps usually taken by a mortgagee to get into possession.

Owner of a charge is not, as a condition of keeping it up, called on to repudiate the estate. His election is not to take the charge or the estate; but whether, taking the estate, he means the charge to sink or continue distinct.

Incapacity of infant to elect.

In all cases where a charge has been held to merge, it was perfectly indifferent to the party, in whom the interests had united, whether the charge should or should not subsist.

BY INDENTURES of lease and release, dated the 7th and 8th of April, 1785, reciting the will of Andrew Moffatt, that the sum of 27,000*l.* was due to his estate from Aaron Moffatt, and that James Moffatt and Hindman, the executors of Andrew, had agreed to lend the further sum of 12,000*l.* upon all the estates of Aaron Moffatt in Jamaica; to secure both the said sums, John Moffatt, the brother of Aaron, being a party, and agreeing to postpone a debt of 13,000*l.*, due to him by Aaron, to the said intended advance of 12,000*l.*, in consideration of the said sum of 12,000*l.*, and to enable the executors of Andrew Moffatt to obtain an immediate security for the said debt of 27,000*l.*, Aaron Moffatt, with the consent of John Moffatt, conveyed to James Moffatt and Hindman, and their heirs, the plantation of Blenheim, &c., and all other the estates of Aaron Moffatt in Jamaica, subject to the payment of the sum of 12,000*l.*; and the same estates were conveyed to James Moffatt, Hindman, and John Moffatt, and their heirs, subject to the said mortgage for 12,000*l.* and to a proviso for redemption on payment to James Moffatt and Hindman of 27,000*l.*, and to John Moffatt of 13,000*l.*

Aaron Moffatt died in 1797, having by his will, dated in 1795, given all his property, real and personal, to his brother John Moffatt; and appointed him sole executor. John Moffatt died in 1807, intestate and without issue.

The bill in the first cause was filed by Forbes and Elizabeth Moffatt, executors of James Moffatt the surviving executor of Andrew, praying an account as to the mortgage of 27,000*l.*, and a foreclosure; charging that John Moffatt, taking possession under the will of Aaron, became the absolute owner of the premises; that his mortgage was thereby extinguished; and, the charge of 12,000*l.* being paid, the 27,000*l.* was the only subsisting mortgage.

The defendant Sarah Moffatt, the widow of John, by her answer insisted upon the mortgage for 13,000*l.* as still subsisting; and prayed

a sale, and an application of the produce to the two mortgages *pari passu*.

The bill in the other cause was filed by Sarah the widow of John Moffatt, and by his next of kin, against the plaintiffs in the first cause, and against Elizabeth Hammond and Martha Bayard, the next of kin of John Moffatt, and his co-heiresses at law, in whom the legal estate was vested under the first mortgage, praying an account with reference to the sum of 13,000*l.*, and a foreclosure.

The acts of John Moffatt, from which his intention not to consider himself a mortgagee was collected, were possession taken upon the death of Aaron; considerable expenditure upon the estate, and the sale of some parts; the payment, as executor of his brother, of 5,000*l.* on the mortgage account, generally, without distinction of the two mortgages; that sum exceeding by about 500*l.* the balance in his hands from the produce of the real estate: on the other hand the registry of the mortgage deed in Jamaica, after the death of Aaron, was relied on by the personal representatives; and accounts kept of the annual supplies and produce of the estate, entitled "The estate of Aaron Moffatt, deceased, in account current with John Moffatt."

The bill in the second cause alleged, that the mortgage deed was not recorded in the Island of Jamaica until after the death of Aaron Moffatt, at his request; that the estates sold by John Moffatt, were not named or considered by him as part of the security, and that the sum of 5,000*l.* was paid only in part of the arrears due. The answer relied on the general words, as comprising all the estates in the security.

Mr. *Martin* and Mr. *Trower*, for the representatives of Andrew Moffatt, plaintiffs in the first cause. Mr. *Leach* and Mr. *Horne*, for the co-heiresses at law of John Moffatt. Sir *Arthur Pigott*, Sir *Samuel Romilly*, Mr. *Heald* and Mr. *Raithby*, for the other parties claiming his personal property.

For the representatives of Andrew Moffatt and the co-heiresses of John.

A mortgagee having acquired the equity of redemption, the effect is, that his interest ceases to be considered as a mortgage, unless, by some clear act, equivalent to a declaration, he evinces his intention to keep alive the charge. The circumstance, that the original mortgage

in this instance was of an equity of redemption, makes no difference ; and the Court will treat it precisely as a legal estate under the same circumstances. The mortgagee taking the estate under his brother's will, and having a right as between his own representatives to keep the charge still subsisting, which, if he does not manifest that intention, would be considered as extinguished, they must show that intention. What third person here has a right to say, this is money? John Moffatt being the only person responsible for this debt, the sole possessor of the funds applicable to its discharge, and continuing for several years to unite in his own person the characters of debtor and creditor, no rational purpose for which he should wish the mortgage to exist, can be stated.

This does not, however, rest upon the accidental union of characters in the individual, but is confirmed by his acts. The acts of entering into possession, and selling parts of the estate, simply stated, though they may assist in forming the conclusion, are not decisive ; but possession taken, not in the usual way as a mortgagee, must be referred to the devise ; and, as evidence of the intention to accept it, goes far towards the conclusion, that he did not mean the mortgage to continue : a conclusion confirmed by the sales which followed. If the possession could be referred to the mortgage he would be a mere trustee for himself and the others ; and can it be conceived, that any person holding possession as a trustee, would proceed to expend on improvements, not only the produce of the estate, but beyond that a considerable sum, his own property, without any communication with the *cestui que trust* ?

With regard to the other fact stated, that he sold part of these estates, conveying them in fee simple, as mortgagee he could sell only subject to the equity of redemption. If it was necessary to show acts inconsistent with his character of mortgagee, these acts are directly so ; but to these acts of John Moffatt are opposed, first, the accounts kept by him, and their title, "The estate of Aaron Moffatt deceased, in account current with John Moffatt." This account, showing only the annual supplies sent out to the estate, and the produce, proves nothing inconsistent with the intention as between the representatives not to consider the mortgage as subsisting. It was

not unlikely, that the parties taking the estate might wish to see how that account stood. Uniting in himself the two characters of real and personal representative, he might conceive that it was necessary for him to keep such an account, in case he should be called on by other creditors of Aaron. This, therefore, affords no evidence against the general rule, that if an intention to keep alive the incumbrance is not manifest, the contrary must be presumed.

As to the payment of 5,000*l.*, whether solely out of the assets, as executor, or partly out of the rents, does not appear; instead of dividing that sum between the two mortgages in the proportions, in which they were entitled, he pays the whole into the bank; and it does not appear that afterwards he kept any account. That must be taken as a payment on account of the other mortgage; and is conclusive as to his intention, being in possession of the legal estate as owner of the equity of redemption, not to keep alive his own mortgage; that he considered it merged in his other title, and the 27,000*l.* as the only subsisting mortgage. Being executor of Aaron, he had a right to retain as a creditor in equal degree. His conduct, therefore, in that instance is utterly inconsistent with the notion, that he was acting upon the strict principle of a mortgagee in possession.

With regard to the registry of the deed, the intention of all parties is clear, that this being a family transaction, should be kept secret during the life of Aaron, lest the registry in Jamaica should disclose his embarrassments. As executor of Aaron, he was bound to do what Aaron ought to have done; and, though there were two mortgages, the deed was entire.

For the personal representatives of John Moffatt it was contended, that the sales and the payment of 5,000*l.*, the only acts giving any colour to the inference that he considered his debt as extinguished, afforded by no means a satisfactory conclusion; the sales being of parts not specifically included in the mortgage; and the payment being much less than was due from him as personal representative of Aaron, liable to account for all his personal property, and that these equivocal acts were opposed by the clear acts of taking possession, registering the deed and keeping the account as mortgagee, and the impolicy of re-

linquishing a specific lien on the West India estate, giving a preference to all debts by simple contract.

Sir William Grant, M. R.—Under the circumstances of this case the question arises between the real and personal representatives of John Moffatt; whether the mortgage for the sum of money due to him is to be considered as still subsisting, in which case his personal representatives are entitled to it; or is extinguished by the union of the characters of owner and mortgagee in John Moffatt; or by any acts done by him after he became owner.

It is very clear, that a person becoming entitled to an estate, subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. Upon this subject a Court of Equity is not guided by the rules of law. It will sometimes hold a charge extinguished where it would subsist at law, and sometimes preserve it, where at law it would be merged. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and, where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot.

The first consideration therefore is, whether John Moffatt has done anything to determine that election, which he undoubtedly had; if not, the question will be upon the presumption of law under the circumstances of the case. It is disputed between the real and the personal representatives whether John Moffatt took possession in his character of owner or of mortgagee. It must, I think, be taken that he entered as devisee. There is no trace of any of the steps that a mortgagee takes to get into possession. He sold part of the estates, which, though not specifically named in the mortgage, were included in it by general words, and as to his keeping an account with Aaron Moffatt's estate, and therein crediting the produce of the devised estates, he could not with propriety do otherwise; for, as they were subject to Aaron Moffatt's debts, the account must have been kept until the debts were paid. But this, I apprehend, goes no way towards the decision of the question.

The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make is not, whether he will take the estate or the charge; but whether, taking the estate, he means the charge to sink into it or to continue distinct from it. The circumstance that John Moffatt caused the mortgage deed to be registered in Jamaica was relied on by the personal representatives, as showing an intention to keep the charge on foot; but the co-heirs say, that as the mortgage to Andrew Moffatt's estate was included in the same deed, it was the duty of John, as surviving trustee, to register it for the benefit of the cestui que trusts.

It is impossible to determine upon which motive he acted: but I think this weighs something in favour of the personal representatives; for, though the deed containing both mortgages must have been registered as it stood, yet, if acting merely for the benefit of the owners of the 27,000*l.* mortgage, he might have entered some memorandum on the record signifying that the other mortgage no longer subsisted. It is hardly to be supposed he could wish publicly to represent his estate as more heavily burdened than he really meant it to be.

The real representatives rely on the payment of 5,000*l.* generally, without any apportionment of that sum between the two mortgages. This appears to have been within about 500*l.*, the whole balance at that time in his hands from the produce of the real estate; and the argument is, that, as he did not apportion that sum between the two mortgages, he must have considered his own mortgage as no longer subsisting. That, however, is far from being a necessary conclusion. He paid the sum and took the receipt as executor of his brother. The whole estate, real and personal, being in his own hands, it would not occur to him formally to set apart the same proportion of his own debt that he paid to others. From his paying the interest of another mortgage it cannot be inferred that he meant to abandon his own. John Moffatt's acts, therefore, furnish no conclusive evidence of actual intention on the subject of this mortgage.

With regard to presumptive intention, it was evidently most advantageous to John Moffatt that this mortgage should be kept on foot; for, otherwise, he would have given priority to the other mortgage and all the debts of his brother. The reasonable presumption, therefore, is,

that he would choose to keep the mortgage on foot. Where no intention is expressed, or the party is incapable of expressing any, I apprehend the Court considers what is most advantageous to him. Upon that principle it was held in *Thomas v. Kemeys* (a), that the charge should not sink; as that was for the advantage of the infant; who, having attained the age of nineteen, had made a nuncupative will, devising all that was in her power to devise to her mother. This could be of no avail as an election by an infant; for she could make none. Her interest must have been the ground of the decision.

In the case of *Lord Compton v. Oxenden* (b), Lord Rosslyn says, "The cases of infants turn upon a supposed intent. The Court saw in *Thomas v. Kemeys*, that it was much more beneficial to the infant that it should continue personal property; because an infant has the use and disposition of that before twenty-one; but he could have no disposable interest in a real estate till that age."

In *Wyndham v. The Earl of Egremont* (c) the limitation was to Lord Thomond for life, with remainder to trustees to preserve contingent remainders to his first and other sons in tail male, and to his right heirs. Yet it was determined that the charge should be raised for the benefit of his personal representatives. What the counsel for the personal representatives contended was, that the charge should not merge, unless at some period in Lord Thomond's life it was indifferent to him whether the term should be kept on foot or not.

Upon looking into all the cases, in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party, in whom the interest had united, whether the charge should or should not subsist; and in that case I have already said it sinks.

There is a case of *Gwillim v. Holland*, referred to in *Lord Compton v. Oxenden*, which, I believe, is not reported anywhere; but which from the statement given of it by the counsel, who cite it, and by Lord Rosslyn, seems to be in point to the present. Mrs. Holland had a charge upon an estate, which she took by devise from her brother. He had made a mortgage on it. The counsel say, Lord Hardwicke thought that "was no merger; because it was more beneficial for her to take it as a charge." Lord Rosslyn says, the intervening incumbrance pre-

(a) 2 Vern. 348.

(b) 2 Ves. jun. 261; see 264.

(c) Amb. 753.

vented the merger ; and it was more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it, than to take it discharged of the incumbrance, and give a priority to the second incumbrancer. Now it was certainly more beneficial for John Moffatt to let the estate stand with the incumbrance upon it, than to give a priority to the other mortgage and to all the debts of his brother Aaron. On the whole, therefore, I think, that the mortgage for 13,000% must be considered as still subsisting for the benefit of John Moffatt's personal representatives.

The doctrine of extinguishment or merger, as applicable to charges, which was discussed in the principal case, is called into operation either where the owner of the charge becomes also by some mode owner of the estate, or the owner of the estate by some mode becomes owner of the charge.

It is derived from the Roman law, where it is termed "*confusio*;" and depends upon this principle, that where the qualities of debtor and creditor are united in the same person, there arises a confusion of rights which extinguishes the two credits. See Code of Louisiana, Art. 2214. It is thus explained by Pothier, "*Il est évident que par le concours de ces deux qualités contraires de créancier et de débiteur en une même personne, elles se détruisent mutuellement; car on ne peut être le créancier et le débiteur tout à la fois; on ne peut être créancier de soi-même, ou débiteur envers soi-même. De-là résulte indirectement l'extinction de la dette, lorsqu'il n'y a pas d'autre débiteur. Car, comme il ne peut y avoir de dette sans débiteur, la confusion éteignant dans la personne qui était seule débitrice la qualité de débiteur, et ne restant plus par conséquent de débiteur, il ne peut plus y avoir de dette: Non potest esse obligatio sine personâ obligatâ.*" Pothier, *Traité des Obligations*, n. 643; and see Lindley, *Introd. to the Study of Jurisp.* 75, 76, App. lvi.

According to our law, as laid down in the principal case, merger or extinguishment, at any rate in equity, will or will not take place according to the intention actual or presumed of the person in whom the two interests are united.

In examining this subject, it will be most convenient to consider those cases—I. Where the owner of the charge becomes also owner of the estate. II. Where the owner of the estate becomes also owner of the charge.

I. *Where the Owner of the Charge becomes also Owner of the Estate.*

As a general rule, where a party entitled to a charge becomes entitled to the estate upon which it is charged, either in fee or in tail, the charge will merge in the estate (*Donisthorpe v. Porter*, 2 Eden, 162; *Lord Compton v. Oxenden*, 2 Ves. jun. 261; *Lord Selsey v. Lord Lake*, 1 Beav. 146).

The law, however, does not prevent a party becoming entitled both to the estate and the charge, from keeping alive the charge; and the rule yields to the intention, of keeping alive the charge, whether it be expressed or presumed.

This is well expressed by Lord Loughborough, C. "It is a clear principle," says his Lordship, "both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion, but there is an immediate merger. But it is true in equity, though there may be that, which, if all were reduced to a legal right, would of necessity operate as a merger, this Court acting upon the trust will, on the intent expressed or implied, preserve them distinct; and that confusion of rights will not take place." Per Lord Loughborough, C., 2 Ves. jun. 264.

No difficulty arises where the intention to prevent confusion, by preserving the charge distinct, is clearly expressed.

There is some difficulty, however, in determining where the intention is to be presumed.

Such intention may be presumed, either from the acts of the owner of the charge and estate, or from the nature of his interest in them.

Where, as is laid down in the principal case, it is of no use to a person to have a charge on his own estate (as is generally the case), it will be held to merge, unless something shall have been done by him to keep it on foot. *Tyler v. Lake*, 4 Sim. 351.

If it be most advantageous to the owner of the estate that the charge should be kept alive the Court of Chancery will presume such intention, notwithstanding the absence of any other indication of such intention. Where, therefore, as in the principal case, the effect of merging the charge in the estate would be to give priority to debts or subsequent incumbrances, it will be presumed that the owner of the estate did not intend the charge to be merged. *Earl of Clarendon v. Barham*, 1 Y. & Coll. C. C. 688; *Grice v. Shaw*, 10 Hare, 76; *Davis v. Barrett*, 14 Beav. 542, 553; *Byam v. Sutton*, W. R. 1853-4, p. 684.

Where, however, the interest intervening between the charge and the ownership of the fee has been created by the act of the owner himself, the reasoning which governs the last class of cases will not apply. Thus

in *Johnson v. Webster* (4 De Gex, Mac. & Gord. 474), A., the devisee in fee of real estates, subject to a trust to raise 6,000*l.* for B., which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate and to go to A., on his marriage conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6,000*l.*, and died, living B. On B.'s death without children, it was held by Lord Chancellor Cranworth, that, under the circumstances, the charge had merged in the inheritance.

Even in the case of a lunatic owner of an estate afterwards becoming entitled to a charge upon it, a merger will, as a general rule, take place, and a trust term to secure the charge makes no difference, as it remains inert, unless required to be executed for proper purposes (*Lord Compton v. Oxenden*, 2 Ves. jun. 261); but if it had been to the advantage of the lunatic to keep the charge alive, as for the payment of his debts, merger will not then take place. *Ib.*

In the case of an infant entitled to a charge becoming also seised of the estate, no merger would, it seems, take place, for this reason, that previous to the new Wills Act (1 Vict. c. 26), an infant might have made a will of personalty before he attained his majority, though he could not do so with regard to realty; it was therefore considered more advantageous to him to retain a testamentary power over the charge, which he would have lost in case of its merger in land. *Thomas v. Kemys*, 2 Vern. 348; and see *Lord Compton v. Oxenden*, 2 Ves. jun. 264, where it is said that these cases relative to infants depend "upon a supposed intention that an infant would have, if he could express it." (*Ib.*) This, however, could not now be urged as a reason for keeping alive a charge, as an infant cannot now make a will. 1 Vict. c. 26, s. 7.

Formerly, in the case of creditors, where real estate was not liable to debts, merger of a charge would not take place. This arose, according to Lord Chancellor Northington, "from the power and justice of the Court of Chancery correcting the illiberality of the law with regard to creditors, which permitted a man to die insolvent, leaving a very good estate." 2 Eden, 164.

In the case, however, of persons dying after August 29, 1833, this reason would be inapplicable, as their real estates are now liable to simple contract, as well as specialty, debts. 3 & 4 Will. 4, c. 104.

II. Where the Owner of the Estate becomes also Owner of the Charge.

Where the absolute owner of an estate becomes also owner of a charge thereon, in the absence of any intention, either express or presumed, on his part, a merger or extinguishment of the debt will take place. *Swabey v. Swabey*, 15 Sim. 106; *Farrow v. Rees*, 4 Beav. 18.

Where a person seised in fee acquires the charge either by succession or by bequest, it will, as a general rule, merge. *Swabey v. Swabey*, 15 Sim. 106; *Price v. Gibson*, 2 Eden, 115.

A person entitled to an estate may also become entitled to a charge thereupon, by paying it off.

Where a person seised in fee of an estate pays off a charge, the presumption arises that he paid it off for the benefit of the estate, and a merger of the estate and charge will thereupon take place. *Seys v. Price*, 9 Mod. 217; Barn. Ch. Rep. 117; *Tyler v. Lake*, 4 Sim. 351, 358; *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186; *Burrell v. Lord Egremont*, 7 Beav. 205; *Harman v. Forster*, 1 Dru. & Wals. 628.

So, likewise, if a tenant in tail pays off a charge upon his estate, a merger will take place, and the amount will not become part of his personal property, unless he manifests an intention that it should do so; for a tenant in tail having the power at his own pleasure to acquire an absolute fee and to defeat the remainder, if he does not exercise that power, it is reasonable to infer that the remainderman is, in a sense, the object of his own choice; and this is the reason of the rule for presuming, unless the contrary be manifested, that, when the tenant in tail pays off a charge, he means the estate, which in effect he gives to the remainderman, should descend to him free from the charge. *Drinkwater v. Combe*, 2 S. & S. 345.

This principle, however, has no application to a tenant in tail in remainder, whose estate may be altogether defeated by the birth of issue of another person; and it must be inferred that such a tenant in tail means to keep the charge alive. *Wigsell v. Wigsell*, 2 S. & S. 364, 369.

Nor is the principle applicable to a person who takes an estate defeasible by an executory devise, paying off a charge upon the estate; because, not having the power to defeat the devisee over, it cannot be intended that such devisee is in any sense the object of his choice; and there is not the same reason for presuming, when he pays off a charge, as in the case of a tenant in tail, that he means to give such devisee the amount of the charge. *Drinkwater v. Combe*, 2 S. & S. 340.

The presumption, however, which arises in the cases before mentioned, may be rebutted by evidence contemporaneous or subsequent, showing the intention to keep the charge separate from the estate. 3 Beav. 518, 519; *Astley v. Milles*, 1 Sim. 298, 345; *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186.

Upon the payment of a charge by the owner of the estate, a contemporaneous transfer of the charge to a trustee, although it may be considered as one of the grounds upon which the presumption may be rebutted, will, nevertheless, not be considered as of itself solely decisive evidence against

the presumption. Thus in *Hood v. Phillips*, 3 Beav. 513, where Elizabeth Lort, the owner in fee of an estate, paid off a mortgage in fee upon it, which was transferred to a person, who on the following day executed a declaration of trust whereby he declared that he held the 500*l.*, paid for the transfer of the mortgage, in trust for E. Lort, "her heirs, *executors, administrators* and assigns respectively," and covenanted to convey to E. Lort, her heirs or assigns, or unto such other person or persons, and in such manner and form as E. Lort, her heirs, executors, administrators or assigns, should direct. E. Lort devised the estate to a trustee to pay an annuity and raise certain legacies, and, subject thereto, to P. L. Phillips, his heirs and assigns for ever, and upon or for no other use, trust, intent or purpose whatsoever. It was held by Lord Langdale, M. R., that the charge had merged in the estate. "It appears to me," said his Lordship, "that if Mrs. Lort really had intended to keep the charge on foot, the declaration of trust was an occasion on which the intention must have been clearly and unequivocally expressed, and the absence of any mention of the trust on which the money was to be held or the mode in which it was to be applied, appears to me to afford evidence in support of the ordinary presumption, far outweighing any evidence against the presumption, which the use of the words 'executors and administrators' in an ill-drawn deed may be supposed to afford."

"There is nothing to show that Mrs. Lort had *any interest* in keeping up the charge, and thinking that the transfer of the mortgage and the declaration of trust, taken together, do not afford *sufficient evidence* to rebut the ordinary presumption that she paid off the charge to relieve the estate, it does not appear to me to be material to consider what advice or what motive induced her to cause the transfer to be made as it was." And his Lordship, after observing, that, from the terms of the will, it was difficult to suppose that it was intended that the estate of the devisee should be charged with 500*l.* for the benefit of the residuary legatee, added, "what the plaintiffs want, is proof of intention to rebut the ordinary presumption in such cases; and the occasion of making the will was such as to make it probable, to say the least, that the testatrix would have distinctly and unequivocally expressed the intention, if she really had it."

"If the charge had belonged to another person, it would have been in no way affected by the terms of the devise; and even in this case (the charge belonging to the testatrix), I do not think that the silence of the will on the subject of the charge is itself conclusive; but it corroborates the impression afforded by the other circumstances of this case; and on the whole, I am of opinion, that there is no sufficient evidence to rebut the presumption that this lady, having paid off the mortgage, intended to extinguish the charge."

The presumption of a merger may also be rebutted, by the owner of the estate and the charge having an interest in keeping up the charge. 3 Beav. 519.

Although a different opinion seems formerly to have prevailed (*The Duke of Chandos v. Talbot*, 2 P. Wms. 601, 604; *Chester v. Willes*, Amb. 246), the rule is now settled, that there is no difference between a charge merely equitable, and one that is supported by an outstanding legal estate. *Astley v. Milles*, 1 Sim. 343, 344.

If a tenant for life pays off a charge on the inheritance, he is *prima facie* entitled to that charge for his own benefit. In the absence of evidence, the presumption is, that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder. *Burrell v. Earl of Egremont*, 7 Beav. 205; *Wyndham v. Earl of Egremont*, Amb. 753; *Faulkner v. Daniel*, 3 Hare, 199, 217.

So where a person taking an estate tail under an act of parliament containing a prohibition of alienation, pays off charges on the estate, as in the case of a tenant for life, the presumption arises that he did not intend the charge to merge in the estate. *Countess of Shrewsbury v. Earl of Shrewsbury*, 3 Bro. C. C. 120; 1 Ves. jun. 227.

In *Trevor v. Trevor*, 2 M. & K. 675, where John, Lord Hampden, being under a settlement tenant for life in remainder, after prior estates for life and in tail, with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to Thomas, Lord Hampden, the ultimate fee; and he being in a dying state and having no issue, made his will, and devised the fee of the settled estate, without declaring any intention with respect to the land tax redeemed. It was held by Sir John Leach, M. R., that the land tax at his death continued to be part of his personal estate. "When Lord John Hampden," said his Honor, "took the assignment of the land tax to himself, that act amounted to a declaration of his intention that the land tax redeemed should be part of his personal estate. It could not afterwards sink into the real estate without his expressed intention to that effect, and there is no evidence of any such intention."

A tenant for life, however, may exonerate the estate of a charge if he think proper, and evidence is admissible to show his intention to do so contrary to the ordinary presumption; but the burden of proof is upon those who allege, that in paying off the charge, he intended to exonerate the

estate. *Burrell v. Earl of Egremont*, 7 Beav. 232; *Astley v. Milles*, 1 Sim. 298, 345.

A tenant for life paying off a charge upon the estate, in the same transaction merging the security, by taking an assignment, connecting it with the legal estate of the inheritance, *prima facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. *Burrell v. Earl of Egremont*, 7 Beav. 232.

The Statute of Limitations (3 & 4 Will. 4, c. 27, s. 40) is not applicable where a charge has been paid off by a tenant for life. Thus in *Burrell v. The Earl of Egremont*, 7 Beav. 205, a tenant for life, in 1773, paid off a charge of 25,000*l.* affecting certain settled estates. He died in 1837, having in the mean time taken no steps for keeping the charge alive. It was held by Lord Langdale, M. R., that it still subsisted for the benefit of his personal representatives. "On the whole," said his Lordship, "it appears to me that the statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent, out of which the interest of the charge ought to be paid, is receivable by and belongs to the same person who is entitled to the interest." See also *Wynne v. Styan*, 2 Ph. 303.

CORBET'S CASE (a).

[REPORTED 1 Co. 83 a.]

PROVISO OR CONDITION REPUGNANT TO GIFT VOID.]—*A covenant to stand seised to the use of the covenantor for life, with remainders over in tail, proviso, that if any of them in remainder in tail shall attempt to alien, the uses shall cease to him as if he were dead, and the estate shall immediately be to such person to whom it would go if he were dead:—Held, that this proviso was repugnant to the estate tail and void.*

CHRISTOPHER CORBET (b), being seised of the manor of S., had issue Rowland and Arthur, and, 30 Eliz., upon good considerations, by his deed indented did covenant with R. S. and others, that he and his heirs would stand seised of the said manor of S. to the use of the said Christopher for his life, and after his decease to the use of the said Rowland and his heirs male of his body; and for default of such issue to the use of the said Arthur and his heirs male of his body; and for default of such issue to the use of divers others of his blood in tail; and at last to the use of the right heirs of the said Christopher. And it was provided, covenanted and agreed by the same indenture between the parties, that if the said Rowland, &c., or any of his heirs male of his body, should be resolved and determine, or advisedly should attempt or procure, any act or thing concerning any alienation of or for the said manor, &c., by which any estate tail thereof before limited should be undone, barred or determined, or by which the same should not come, remain, and be in manner and form as is limited by

(a) S. C. Moor, 601, 633; 2 And. 134.

(b) See the references supra.

the same indenture ; that then after that and before any such act done by which, &c., before any such bargain, discontinuance, &c. had or executed, &c., the uses and estates to him limited who should so do, &c. should cease only in respect, and having regard to such person so attempting in the same manner, quality, degree and condition, as if such person so (c) attempting was naturally dead, and not otherwise. And that then immediately in all such cases the uses of the said manor should be to such persons to whom the uses should come by the intent of the same indenture as if such person so attempting was naturally dead, of such and the like estate, and in the same manner and form, and with such remainders over, and under such limitations and conditions as if such person so attempting was naturally dead, and not otherwise. The said Christopher Corbet died, and afterwards Rowland suffered a common recovery to his use, &c., and the said Arthur entered into the land, upon whom Rowland re-entered, and Arthur brought an action of trespass ; and if the entry of Arthur was congeable or no was the question. In this case divers matters were moved at the bar, which were not unanimously agreed by the justices at the bench, and divers matters were moved by the justices in their arguments concerning the general case of perpetuities ; (but I shall make a summary report only of the principal reasons and causes of their judgment, in which all the justices of the Common Pleas were unanimously agreed.) 1. It was resolved by the Lord Anderson, Walmsley, Glanvill and Kingsmill, justices, that this proviso to cease an (d) estate limited to one and his heirs male of his body, as if the tenant in tail was dead, was repugnant, impossible, and against law ; for the death of tenant in tail is not *a cesser* of the estate tail, but the death of the tenant in tail without issue of his body is the determination thereof. And therefore if the proviso had been that the estate tail should cease, as if he had granted a rentcharge, or made a lease for years to another, that had been repugnant ; for such acts do not make a determination of an estate tail ; and if the estate tail should cease, as if he was dead, his issue inheritable to the estate tail would have it by descent in the life of his father, or he in the remainder or reversion would have it in the life of the

(c) 1 Co. 130 a.

Jac. 697, 698 ; 1 Co. 130 a ; 6 Co. 40 b ;

(d) Litt. s. 720 ; Co. Litt. 377 b ; Cro. Rayn. 355.

tenant in tail, which is not possible; for to every descent, reversion or remainder upon the determination of an estate tail, death, either civil, as entry into religion, or natural, as dissolution of the soul from the body, is requisite. And as to what some have objected, that although it be granted that when tenant in tail hath issue inheritable to the estate tail, that there is a repugnancy and impossibility that the issue should inherit, or the land remain or revert, for descend it cannot, because the father is living; and revert or remain over it cannot, because tenant in tail hath issue; yet it was said, that there was not any such repugnancy or impossibility at the time of the breach of the proviso by the tenant in tail in the case at the bar, because the tenant in tail had not any issue at the time of the breach of the proviso. To that it was answered, that the having of issue is not material; for when land is limited to one and the heirs male of his body, with a proviso annexed to it in the same conveyance, that if he do such act his estate shall cease as if he was dead, this (proviso) is repugnant to the beginning; for by the express limitation he hath an estate of inheritance, which by possibility may continue for ever; and his estate of inheritance doth not begin by the having of issue, but presently, before any issue, he hath an estate of inheritance. And therefore before issue his feoffment is a discontinuance and no forfeiture, neither shall he in the reversion be received upon his default in a *præcipe*. And therefore if a man makes a gift in tail, upon condition that if he dies his estate shall cease, and the donor re-enter, this condition is void: and in such case, if tenant in tail be disseised, and a descent is cast, or if tenant in tail makes a discontinuance, and afterwards tenant in tail dies without issue, the donor shall not enter for this condition broken; for although the estate in tail ceased by accident afterwards by his death, yet the condition was repugnant at the time of the creation of the estate tail; for if a man makes a lease for life, in the judgment of the law at the beginning, death is the determination of that estate by express limitation; but if a man gives lands in tail, viz. to one, to have to him and his heirs of his body, there it appears by express limitation, that in judgment of law death is not a determination of it, but death without issue of his body. It is likewise repugnant that land should revert or remain during the life of tenant in tail himself, as it hath been said.

And Anderson, Chief Justice, put the case in 8 (e) Ass. pl. 83, where a man gave lands to one Mary, and Joan her sister, *et hæredibus de corporibus earum legitime procreatis* (by which they had a joint estate for life, and several inheritances, and the donor intending that neither of them should break the jointure, but that the survivor should have all by *jus accrescendi*, added this clause), *sub hac forma quod illa quæ illarum diutius vixerit tenebit terram illam integram*; but forasmuch as his intent is contrary to law, therefore if the jointure be severed by a fine levied, the survivor shall not have the part so severed by the said clause, which he hath inserted out of his own conceit and imagination, repugnant to law and reason. So here the intent of Christopher was, that the estate tail should cease, as if tenant in tail was dead, which intent is repugnant to the rules of law, and against sense and reason. And he cited also the case of (f) Plessington, 6 R. 2, which see Title, *Quid juris clamat*, pl. 20. A man makes a lease upon condition, that if the lessor grant the reversion, that the lessee shall have fee; if the lessor grant the reversion by fine, he shall not have fee, for the condition is repugnant and void. And further he held, that this proviso was utterly void for the (g) uncertainty, for Judges ought to know the (h) intent of the parties by certain and sensible words which are agreeable and consonant to the rules of law; and therefore if land be given by deed to two, to have and to hold to them, *et (i) hæredibus*, it is void for the insensibility and uncertainty, and although it hath a clause (j) of warranty to them and their heirs, that will not make the first words which are uncertain and insensible to be of force and effect in law, although his intent appeareth, but his intent ought to be declared by words certain and consonant in law. And he cited two cases adjudged in the point, one in the case of a will, and the other in the case of a use; and the case of the will was in an action of waste, be-

(e) Co. Litt. 183 a; 2 And. 12, 138; Br. R. 187.
 "Joint-tenants," 40.

(f) Co. Litt. 178 b; Plowd. 26 a, 34 b, 487 a; 8 Co. 76 a; Dyer, 209, pl. 21; Perk. s. 729; 1 And. 316; Cro. Jac. 698; 1 Jones, 58, 59; Godb. 105; 1 Ro. R. 478, 485; 21 H. 7, 11 b; 2 Brownl. 227, 294; Goldsb. 6; Co. Litt. 378 b.

(g) 6 Co. 42 a, b; Cro. Jac. 698.

(h) Co. Litt. 314 b; 2 Co. 23 b; Litt.

(i) Hob. 174; Co. Litt. 8 b; B. N. C. 156; Br. "Estate," 4, 18, 73; 19 H. 6, 73 b; 20 H. 6, 35 b; 22 H. 6, 15 b; 22 E. 4, 16 b; Fitz. "Feoffment and Fairs," 8; Plowd. 28 b; Bridg. 134; 8 Co. 155 a; 1 Roll. 833; Perk. s. 181; Keilw. 104, nu. 26; 1 And. 225; 2 And. 141, 142; 3 Bulstr. 126; 4 Leon. 246.

(j) 10 Co. 97 a; Co. Litt. 385 b, 333 b.

I. *Where the Owner of the Charge becomes also Owner of the Estate.*

As a general rule, where a party entitled to a charge becomes entitled to the estate upon which it is charged, either in fee or in tail, the charge will merge in the estate (*Donisthorpe v. Porter*, 2 Eden, 162; *Lord Compton v. Oxenden*, 2 Ves. jun. 261; *Lord Selsey v. Lord Lake*, 1 Beav. 146).

The law, however, does not prevent a party becoming entitled both to the estate and the charge, from keeping alive the charge; and the rule yields to the intention, of keeping alive the charge, whether it be expressed or presumed.

This is well expressed by Lord Loughborough, C. "It is a clear principle," says his Lordship, "both at law and in equity, that where there is a confusion of rights, where debtor and creditor become the same person, there can be no right put into exertion, but there is an immediate merger. But it is true in equity, though there may be that, which, if all were reduced to a legal right, would of necessity operate as a merger, this Court acting upon the trust will, on the intent expressed or implied, preserve them distinct; and that confusion of rights will not take place." Per Lord Loughborough, C., 2 Ves. jun. 264.

No difficulty arises where the intention to prevent confusion, by preserving the charge distinct, is clearly expressed.

There is some difficulty, however, in determining where the intention is to be presumed.

Such intention may be presumed, either from the acts of the owner of the charge and estate, or from the nature of his interest in them.

Where, as is laid down in the principal case, it is of no use to a person to have a charge on his own estate (as is generally the case), it will be held to merge, unless something shall have been done by him to keep it on foot. *Tyler v. Lake*, 4 Sim. 351.

If it be most advantageous to the owner of the estate that the charge should be kept alive the Court of Chancery will presume such intention, notwithstanding the absence of any other indication of such intention. Where, therefore, as in the principal case, the effect of merging the charge in the estate would be to give priority to debts or subsequent incumbrances, it will be presumed that the owner of the estate did not intend the charge to be merged. *Earl of Clarendon v. Barham*, 1 Y. & Coll. C. C. 688; *Grice v. Shaw*, 10 Hare, 76; *Davis v. Barrett*, 14 Beav. 542, 553; *Byam v. Sutton*, W. R. 1853-4, p. 684.

Where, however, the interest intervening between the charge and the ownership of the fee has been created by the act of the owner himself, the reasoning which governs the last class of cases will not apply. Thus

in *Johnson v. Webster* (4 De Gex, Mac. & Gord. 474), A., the devisee in fee of real estates, subject to a trust to raise 6,000*l.* for B., which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate and to go to A., on his marriage conveyed the estates to the trustees of his marriage settlement, subject to the trust to raise the 6,000*l.*, and died, living B. On B.'s death without children, it was held by Lord Chancellor Cranworth, that, under the circumstances, the charge had merged in the inheritance.

Even in the case of a lunatic owner of an estate afterwards becoming entitled to a charge upon it, a merger will, as a general rule, take place, and a trust term to secure the charge makes no difference, as it remains inert, unless required to be executed for proper purposes (*Lord Compton v. Oxenden*, 2 Ves. jun. 261); but if it had been to the advantage of the lunatic to keep the charge alive, as for the payment of his debts, merger will not then take place. *Ib.*

In the case of an infant entitled to a charge becoming also seised of the estate, no merger would, it seems, take place, for this reason, that previous to the new Wills Act (1 Vict. c. 26), an infant might have made a will of personalty before he attained his majority, though he could not do so with regard to realty; it was therefore considered more advantageous to him to retain a testamentary power over the charge, which he would have lost in case of its merger in land. *Thomas v. Kemys*, 2 Vern. 348; and see *Lord Compton v. Oxenden*, 2 Ves. jun. 264, where it is said that these cases relative to infants depend "upon a supposed intention that an infant would have, if he could express it." (*Ib.*) This, however, could not now be urged as a reason for keeping alive a charge, as an infant cannot now make a will. 1 Vict. c. 26, s. 7.

Formerly, in the case of creditors, where real estate was not liable to debts, merger of a charge would not take place. This arose, according to Lord Chancellor Northington, "from the power and justice of the Court of Chancery correcting the illiberality of the law with regard to creditors, which permitted a man to die insolvent, leaving a very good estate." 2 Eden, 164.

In the case, however, of persons dying after August 29, 1833, this reason would be inapplicable, as their real estates are now liable to simple contract, as well as specialty, debts. 3 & 4 Will. 4, c. 104.

II. *Where the Owner of the Estate becomes also Owner of the Charge.*

Where the absolute owner of an estate becomes also owner of a charge thereon, in the absence of any intention, either express or presumed, on his part, a merger or extinguishment of the debt will take place. *Swabey v. Swabey*, 15 Sim. 106; *Farrow v. Rees*, 4 Beav. 18.

law be conveyed by act executed in his life by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended in law to be (r) *inopis consilii*. As if a man by his will devises land to one (s) for ever, there he hath a fee, for such estate might be conveyed by act executed. But if he devises further, that if the devisee do not such an act, that another shall have the land to him and his heirs, the same is void as is aforesaid, for such a limitation, if it was by act executed, was void, *et sic de cæteris* (t).

And it was resolved, that the said (u) proviso was repugnant for two reasons; one, because when he had devised the land to one and the heirs male of his body, which is an estate of inheritance and determinable on death without issue male of his body by express limitation, such proviso to cease it, as if he was dead, is repugnant, for the death of tenant in tail is not (x) a determination of it, but death without issue. Secondly, it was repugnant, for the first part of the proviso was, that if he shall attempt or go about to discontinue, bar, &c., and shall accomplish and effect the same, then that his estate shall cease from the time of attempt, &c. and before such alienation; in which it was agreed there was a manifest repugnancy, for by the first part the estate should not cease until an attempt and accomplishment, and by the later part it should cease after attempt and before accomplishment. And these were the reasons of their judgment in the said case between Germin and Arscot, which being in the case of a will which receiveth (y) a benign interpretation according to the testator's intent is stronger, as the Lord Anderson said, than the case at the bar.

The other case which the Lord Anderson cited was adjudged Hil. 37 Eliz. between (z) Cholmley plaintiff, and Humble defendant, in *Com' Banco*, and was such; Sir Richard Cholmley, seised in fee of the manor of Thornton-super-Montem, &c., by his deed indented, covenanted with William Bapthorp, Philip Constable, John Hussey and others, and their heirs, that in consideration that the said manor should

(r) 3 Co. 20 b; 8 Co. 95 a; 3 Bulst. 106.

(s) Co. Litt. 9 b, 322 b; Litt. a. 586; 3 Keb. 96; 1 Bulst. 219, 222; Bridgm. 16, 135; Kel. 43 b; Mo. 57; 1 Vent. 216.

(t) Such a devise, if within the limits of the rule against Perpetuities, would now be clearly valid as an executory devise.

(u) Cro. El. 379.

(x) 1 Co. 84 a; Mo. 592.

(y) Co. Litt. 112 a; 1 Co. 101 a.

(z) 2 And. 142, 149; 6 Co. 43 a; 10 Co. 42 b; Winch. 56; Cro. Eliz. 378; 1 And. 346; Mo. 592, 633.

continue in his name and posterity, and in consideration of natural love and blood, &c., that he would enfeof them and their heirs within one year following, to the uses, intents and purposes following, and declared in the same indenture, viz. to the use of himself for the term of his life, and afterwards to the use of Francis Cholmley for life, and afterwards to the use of Henry Cholmley and the heirs male of his body, with divers remainders over; and further covenanted by the same deed, that if he failed to execute the estate within the said year, that then he and his heirs, for the considerations aforesaid, would stand seised to the uses and intents aforesaid, and to no other. And in the same indenture after the said covenant was a proviso, that if the said Henry Cholmley, or any of the heirs male of his body, should attempt or make any feoffment, &c., that his estate should cease as if he was dead, and that then the said William Bapthorp and the other feoffees and their heirs should stand seised to the use of such person to whom it ought to descend, or remain by the said deed intended, as if he was dead; with the remainders over as aforesaid, and no feoffment was made within the year: and afterwards Sir Richard and Francis died, Henry had issue Richard the plaintiff, and levied a fine with proclamations to Humble the defendant, the plaintiff entered by colour of the aforesaid proviso, the defendant entered upon him, and he brought an action of trespass. And it was adjudged against the plaintiff. And the principal reason of the judgment, as the Lord Anderson said, was, because the said (a) proviso to cease an estate tail as if tenant in tail was dead, was utterly against law, impossible and repugnant to the beginning at the time of the delivery of the indenture. And in the same case it was also agreed, that if a man limit a use in tail, with a proviso that if he do such an act that his estate shall (b) cease during his life, that such proviso is utterly void (c). And it was agreed, that if a man limit a use in tail, with a proviso that if he do such an act that his estate shall cease during his natural life, that this proviso is repugnant and contrary to law, for he cannot by proviso or condition

(a) Mo. 592.

(b) Cro. Eliz. 374; 1 Co. 138 b; Co. Litt. 27 a; 6 Co. 41 b; 8 Co. 17 a.

(c) But by conditional limitation an es-

tate may be limited to go over before the natural end of an estate tail. *Lady Ann Fry's Case*, 1 Vent. 199; *Shuttleworth v. Barber*, 2 Mod. 7; 4 Dow, 163.

determine the estate in the land to which it is annexed in part. For now when the stat. of 27 H. 8, hath transferred the use into possession and estate of the land, he cannot make a fraction in that estate in case of limitation of use, which he cannot do in a gift in tail by livery in possession, for the statute hath not transferred the possession to the use, but hath (*d*) transferred and incorporated the use in the estate of the land, which is proved by the usual form of pleading, that is to say, *de usibus in possession' transferend'*; and, therefore, as to this purpose, since the said act of 27 H. 8, it is as much as if a man had made a (*e*) gift in tail with proviso, or upon condition, that if the donee do such an act that his estate shall cease during his life; or if a feoffment in fee be made with proviso, or upon such condition that his estate shall cease during his life; these provisoes or conditions are utterly void and against law; for a condition or limitation annexed to an estate of land ought to destroy the whole estate to which it is annexed, and not part of it; and (*f*) he who enters for a condition broke ought to have the same estate that he had when he made the estate conditional.

And Walmesley, Justice, said, that when an estate is given to one it may be defeated wholly by a condition or limitation, but the same estate, or any part of it, cannot be determined as to one and given in part or in all to another, for that is repugnant to the rules of law. As if a man makes a lease for life upon condition that if he do not pay 20*l.* that another shall have the land, this future (*g*) limitation is void; and in the case at the bar the donor might have annexed a condition or limitation to determine his estate; but in this case the donor intended to continue the estate tail, and to cease it as to one and in his life to transfer it to another. If after the stat. of 1 R. 3, and before the stat. of 27 H. 8, a man had made a feoffment to the use of one for life or in tail, and after to the use of another for life or in tail, and after to the use of another in fee, those in the remainder could not make a feoffment or grant of their estates by the general words of the act of the 1 R. 3, for then there would be a fraction and division of estates

(*d*) 3 Co. 27 a.

(*e*) Co. Litt. 224 a; 6 Co. 41; Perk. s. 718; Shep. Touch. 127; 6 Co. 40 b; 4 Burr. 1941; 4 Dow, 162; 1 Co. 208, n.

(*f*) Co. Litt. 202 a, b.

(*g*) Plowd. Com. fo. 25 a; Co. Litt. 214 a; 1 Jones, 58; Lucas, 366; Plowd. Com. 249-350.

which the law will not suffer. And he also said, that the case in 5 E. 2, tit. Dower, 143, of a (h) rent newly created is not against his opinion; for there the condition is, that if the grantee die, his heir within age, that during that time the tertenant should be quit of the rent, which he said is good and parcel of the quality of the inheritance of that new thing: as in 9 H. 6, 36 a, a man grants common newly created (i) *quandocunque averia sua ierint*, this is *modus donationis*, and the grantee shall not have common there but in that manner; but if a man makes a feoffment in fee upon condition, that if the feoffee die his heir within age, that his estate shall cease during the minority of the heir, that is utterly void, for an estate of land cannot so cease for the reasons aforesaid; and also because, if an estate of land should so cease, vest and revest, it would be dangerous to the præcipe of the stranger, which inconvenience is not in the case of the rent or common newly created. And Glanville, Justice, said, that the case of the rent is not to be resembled to land, for a rent newly created may cease but land cannot.

But note, reader, and observe well the said book in (k) 5 E. 2; for there, during the minority of the heir, the writ of dower was brought against the tertenant, and not against the heir, which proveth that the estate of the rent was not divided, for then the writ of dower should be brought against the heir, although the estate of the rent during his minority ceases; but the writ of dower was brought against the tertenant, which proveth (as I conceive) that for the time the rent newly created *per modum concessionis* ceased: and note in the same case, when the heir came of full age, the demandant had execution against him. And Walmesley, Justice, said, that if a man makes a feoffment in fee of land to the use of A. and his heirs every Monday, and to the use of B. and his heirs every Tuesday, and to the use of C. and his heirs every Wednesday, these limitations are void, for we do not find such fractions of estates in law. And if (l) coparceners do agree to present by turns, this is a partition as to the possession, but notwith-

(h) 1 Co. 130 a, b; Perk. s. 327; Plowd. 156 a; 10 H. 7, 13 b; 12 E. 3, "Condit." 11; 22 E. 3, 19 a; 4 Leon. 83; 6 Co. 41 a; 8 Co. 17 b.

(i) Cro. Car. 599; 1 Roll. 403, 404; Perk. s. 109; Br. "Common," 3; Br.

"Grant," 5; Hob. 40.

(k) 5 E. 2, "Dower," 143; 22 E. 3, 19 a, b; 29 a, b; 20 E. 3, "Qu. Impedit;" Fitz. 63, 65, and Fitz. N. B. 36.

(l) 2 Roll. 255; 2 Vent. 39.

standing that they shall join in a writ of right. So a partition that one parcener shall have the land from (*m*) Easter to the 1st of August, in severalty, and that the other shall have it from the 1st of August until Easter in severalty, this is good as to the possession and taking of the profits, but it is no severance of the estate of inheritance. And he said, it would be strange and against reason, that this estate in the case at the bar should end in regard to one and continue in regard to another, and that Rowland should be dead when one saw him and be alive when another saw him (*n*); an act of parliament or the common law may make an estate void as to one and good as to another, but a man by his words and the breath of his mouth cannot do it (*o*). As if land be given to husband and wife, and to the heirs of their two bodies begotten, and the husband levieth a fine with proclamations and hath issue and dieth; now this fine by force of the act of parliament of 32 H. 8, c. 36, shall bar the issue in tail, but shall not bind the wife: and so in respect to one a good bar, and in respect to the other no bar. So in a *præcipe*, if one be (*p*) vouched now having regard to the defendant, the vouchee is tenant and a release to him is good, but having regard to a stranger he is not tenant, and a release to him by a stranger is void. So if one hath a term for years as executor and surrendereth it, now to one respect the term is extinct, and to another respect it is assets. So that an act of parliament or an act of the law may do it in divers cases to several respects, but a man by his words cannot do it, viz. make an estate cease as to one and continue as to another, to make a man half alive and half dead, as he said. If one might limit estates in land to cease during the minorities of the heirs, and other persons to have the land during that time, then all wardships may be defeated; and great inconveniences would ensue, and, therefore, he said this manner of ceasing of estates and of carrying one and the same estate, or any part thereof, from one to another without determination, and namely, from one alive to another alive, is impossible and against law and

(*m*) Co. Litt. 4 a, 167 a, 180 a; 1 Roll. Abr. 629; Cro. Eliz. 421; F. N. B. 62 K.

(*n*) Cro. Eliz. 379; 6 Co. 40 b; Raym. 355; 13 Co. 64; 18 Eliz., Dy. 351 b.

(*o*) 8 Co. 72 b; 9 Co. 139 a; Dy. 351, pl. 24; N. Ben. 225; Ben. in Ash. 24;

Ben. in Kel. 213 b; Dal. in Kel. 205 a, b; Dal. in Ash. 7; Dal. 50, pl. 16; 1 And. 39.

(*p*) 3 Co. 29 b; 8 Co. 151 b; 10 Co. 48 b; Litt. s. 491; Co. Litt. 265 b; 9 H. 7, 26 a; 7 E. 4, 13 b; 10 E. 4, 13 a.

reason, and inconvenient; and he said, that if a man before the statute of 27 H. 8, had bargained his land for (q) money generally, without these words "his heirs," the Chancellor would oblige him according to conscience and the intent of the parties in regard of the value, to have executed an estate in fee, and that was so long as uses were things merely in trust and confidence: but the (r) uses since the statute are transferred and made into an estate in the land; and, therefore, he said, that if after the statute he bargains and sells the land to one generally for money, he hath but an estate for life.

And Glanville, Justice, said, that betwixt the making of the statute of 13 E. 1, *De donis conditionalibus*, and 27 H. 8, such proviso annexed to an estate tail, that it should cease as if the tenant in tail was dead, was never seen nor heard of; and therefore he concluded, that it cannot be done by the law. And so Littleton concludeth fol. (s) 23, in the like case, that if any action might have been taken or brought upon the Statute of Merton, cap. 6, *De dominis qui maritaverint illos, &c., si parentes conqueruntur, &c.*, it should be intended sometime to have been put in ure, and therefore he said, no action can be brought upon that statute, forasmuch as it was never seen nor heard, that any action was brought upon that statute. And he said that uses were not within the letter of the statute *De donis conditionalibus*, which speaketh only of lands and tenements, but are taken within the equity, and therefore ought to follow the nature of the land. And before the statute of 27 H. 8, the Chancellor, in the case of a use, judged by imitation of the rules of the common law, and according to the nature and quality of the land, as in case *de (t) possessione fratris*, Borough-English, Gavelkind on the part of the mother, &c., and so his judgment was by way of imitation; and the makers of all the statutes concerning uses, as 1 R. 3, cap. 5; 4 H. 7, cap. 17; 9 H. 7, cap. 15, and all other statutes, have made uses to imitate and resemble estates in possession, and to be guided and directed according to the rules and reason of the common law. And he said, that (u) Richill,

(q) 1 Co. 100 b; 1 And. 35; 8 Co. 94 a; 1, 2; 1 Inst. 81 b; 1 Co. 48; 4 Co. 22 a.
 3 Keb. 317; 27 H. 8, 5 b; Br. "Estate," (t) 2 And. 146; Co. Litt. 23 a; Hob. 31.
 3; Br. "Contract," 1. (u) 2 And. 135, 138; 6 Co. 42 b; 1 Co.
 (r) Raym. 287, 317. 130 a; Litt. s. 720; Co. Litt. 377 b; 1 Roll.
 (s) Litt. s. 108; Co. Litt. 81 a; Cro. Car. Rep. 485; 1 Co. 131 b.

who was a Judge in the time of R. 2, and Thirning, who was Chief Justice of the Common Pleas in the time of H. 4, intended to have made perpetuities (*x*), and upon forfeiture of the estate tail of one of their sons to have given the remainder and entry to another ; but such remainders were utterly void, and against the law. And for these reasons it was resolved *per totam Curiam* (*nullo contradicente*), that judgment should be given against the plaintiff, and so it was, as appears before by the record.

(*x*) 1 Co. 377 b; 10 Co. 36 b; 3 Ch. Cas. 46.

BRADLEY v. PEIXOTO.

March 10th, 1797. Rolls.

[REPORTED 3 VES. 324.]

A condition inconsistent with the gift is void ; therefore upon a bequest to A. for life, and at his decease to his heirs, executors, administrators and assigns ; but if he attempts to dispose of the principal, over, A. takes the absolute interest ; and the condition, being inconsistent with it, is void.

Condition that a tenant in fee shall not alien, or that a tenant in tail shall not suffer a recovery, is void.

THIS cause arose upon the following disposition by the will of Thomas Bradley :—

“I give and bequeath to my son Henry Bradley the dividends arising from 1,620*l.* of my Bank Stock, for his support during the term of his life ; but at his decease the said 1,620*l.* Bank Stock, principal and interest, to devolve to his heirs, executors, administrators and assigns. Having observed, during the term of my life, so many fatal examples of parents having left their children in a state of opulence, who have afterwards been reduced to want the common necessities of life, my principal view in this will is, that my wife and children may have a solid sufficiency to support them during their lives. For this purpose I will and most strictly ordain, that if my wife or any one of my children shall attempt to dispose of all or any part of the Bank Stock, the dividends from which is bequeathed to them in this will and testament for their support, during their lives, such an attempt, by my wife or any of my children, shall exclude them, him or her so attempting, from any benefit in this will and testament, and shall forfeit the

whole of their share, principal and interest; which shall go and be divided unto and among my other children, in equal shares, that will observe the tenor of this will and testament."

The bill was filed by Henry Bradley against one of the daughters of the testator, who had taken out administration. The prayer of the bill was, that the defendant might be decreed to transfer the 1,620*l.* Bank Stock to the plaintiff. The other children were out of the jurisdiction.

Sir R. P. Arden, M. R. (a).—The first clause is an absolute gift of the principal and dividends. But then comes this clause, with which the plaintiff does not comply; and the question is, whether, by the rules of this Court, he can demand the legacy, not complying with the injunction the testator has laid upon him; or rather, whether the condition is consistent with the gift. Seeing the father's intent so clearly and strongly expressed, I have taken some time to consider this case; and have endeavoured to satisfy myself that I am at liberty to refuse the plaintiff the demand which he now makes. Indeed, another reason for delaying my judgment was, that there appeared to be other children who were interested in this question, and are not parties to the cause. The reason given for not having them before the Court is, that they are all out of the jurisdiction. Had they been in this country, I should have expected them to have been made defendants to sustain their interests; but as they live abroad, the cause has proceeded without them; and, according to the opinion I have formed of this case, they are not necessary parties; because I feel myself obliged to say, that the proviso I have before stated is of no effect.

I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established, that *where there is a gift, with a condition inconsistent with, and repugnant to such gift, the condition is wholly void*. A condition that tenant in fee shall not alien, is repugnant; and there are many other cases of the same sort, *Piers v. Winn*, 1 Vent. 321; Roll. 435. The report in Ventris is very confused;

(a) The Reporter, not having been present, was favoured with a note of the judg-

ment by a gentleman whose accuracy is universally acknowledged.

but it appears clearly from the report of this case in Pollexfen (p. 435), as well as from many other cases, that the Court meant to say, that where there is a gift in tail, with condition not to suffer a recovery, the condition is void. There are several cases of this kind collected in 2 Danv. Ab. 22, which show, that a condition repugnant to the nature of the estate given is void: Co. Litt. 223 a; Dy. 264; *Mildmay's Case*, 6 Co. 40. *Stukely v. Butler*, Hob. 168, is of the same kind; where it was held, that an exception of the very thing that is the subject of the gift, is of no effect. In all these cases the gift stands, and the condition or exception is rejected.

In this case, then, I am under the necessity of declaring that this is a gift with a qualification inconsistent with the gift; and the qualification must therefore be rejected. This is not like *Socket v. Wray*, 4 Bro. C. C. 483; for there the gift was to a feme covert for life, and then to such uses as she should by will appoint. She could only appoint by will, and could not bind her executors by any deed in her lifetime; and I declared, in determining that case, that I should think otherwise in the case of a man or any person having an absolute interest. A man could bind his executors, but not a feme covert. If this had been a gift to the son for life, and after his death as he should appoint, and, in default of appointment, then to other persons, I desire not to be understood that it would not be good; if in default of appointment it was to go to his executors, I should doubt whether it would be so; but I give no opinion upon this. Upon the whole, I am obliged to hold this condition repugnant to the gift, and therefore void. Declare, that the condition annexed to the legacy of 1,620*l.* Bank Stock is repugnant to and inconsistent with the interest given to the legatee of the stock, and therefore void; and upon payment of the costs of this suit by the plaintiff, let the stock be transferred to him.

In *Peixoto v. The Bank of England*, Chan. 3rd of June, 1797, the subject of which was a disposition of stock by the same will, in precisely the same manner, the Lord Chancellor was very clearly of opinion, that it was an absolute, not a limited interest, and decreed accordingly.

In *Corbet's Case*, and *Bradley v. Peixoto*, the principle is clearly laid down and acted upon, *that conditions or restraints, inconsistent with and repugnant to any estate or interest to which they are annexed, are absolutely void.*

Many instances may be given of the application of this principle. For instance, it is well established, that the power of alienation is incidental to an estate in fee; it follows, therefore, from the principle laid down in *Bradley v. Peixoto*, and is well established by the authorities, that any condition annexed to a conveyance or devise, to a person in fee, either that he shall not alien generally (Co. Litt. 206 b, 223 a), or in a particular mode, as by mortgage, fine or recovery, even although there be a devise over on alienation, will be bad (*Ware v. Cann*, 10 Barn. & Cress. 433), and the estate absolutely discharged from the condition.

Upon the same principle, where a testator directed that an estate he had devised should not be liable to any annuity granted by any heir or heirs at law, but that so much and such part thereof, as should be made liable to such annuity, should from thenceforth become forfeited to his nephew J. G., it was held by Lord Cottenham, C., that the condition was void, upon the ground that it was an attempt, on the part of the testator, to protect an estate in fee from the liability to debts and contracts of the owner; and that for ever, the proviso not being confined to the particular heir designed as devisee, but to all heirs-at-law. *Willis v. Hiscox*, 4 My. & Cr. 197, 198, 201, 202.

Although a general restraint upon alienation is bad, a *partial* restraint is valid. Thus a condition annexed to a devise in fee, not to alien in mortmain, or to any particular person or persons is valid (Co. Litt. 223 a, b); and it has even been held, that a condition only to alien to a particular person or persons is good (*Doe d. Gill v. Pearson*, 6 East, 173; *Daniel v. Ubley*, Sir W. Jones, Rep. 137; Latch. 9, 39, 134; Dalison, 58). This, however, is contrary to the law laid down in *Muschamp v. Bluet*, Bridgm. 137, and has been distinctly overruled in the recent case of *Attwater v. Attwater*, 18 Beav. 330. There the testator gave an estate to A. "to become his property on attaining the age of twenty-five years, with an injunction never to sell it out of the family; but if sold at all, it must be to one of his brothers hereafter named." It was held by Sir J. Romilly, M. R., that the restriction on alienation was inoperative. "The meaning is," said his Honor, "I think, plain, that the testator intended to impose this fetter—that if the brother will not buy, the devisee was not to be at liberty to sell the property to any one. The question is, whether such condition is a valid one? Notwithstanding the case of *Doe d. Gill v. Pearson* (6 East, 173), this appears to me to be a con-

dition repugnant to the quality of the estate given. It is obvious, that if the introduction of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named; inasmuch as the name of a person who alone is permitted to purchase, might be so selected, as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all. . . . It is not, in my opinion, desirable to impose fresh fetters on the enjoyment of property, and it appears to me, that this proviso is distinctly at variance with the rules laid down by Lord Coke (Co. Litt. 223 a), and which have always been considered and treated as good law."

A condition not to alien within a limited time, it seems, is good. Thus it is stated in *Churchill v. Marks*, 1 Coll. 445, that "in the course of the argument, an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to A. in fee, with a proviso that if A. alien in B.'s lifetime the estate shall shift to B., is valid." See also *Large's Case*, 2 Leon. 82, and *Doe d. Stevenson v. Glover*, 1 C. B. 448.

Upon the same principle the power of barring an estate tail formerly by fine or recovery, and now in the mode provided for that purpose in the Fines and Recoveries Abolition Act (3 & 4 Will. 4, s. 74), is an inseparable incident to the estate of a tenant in tail, and any condition or proviso restraining or prohibiting it, as is well shown in *Corbel's Case*, is repugnant to the nature of the estate, and therefore void. See ante, p. 358.

The principal case of *Bradley v. Peixoto* clearly shows that conditions in restraint of alienation, after an absolute gift of personalty, even though there be a limitation over on such alienation, are void in the same manner as similar restraints upon the alienation of estates in fee or tail.

Upon the same principle the devolution of property absolutely conferred upon a person, cannot, as being incidental to or resulting from his interest, be separated from such property. Thus in the recent case of *Ross v. Ross*, 1 J. & W. 154, where there was a bequest of a legacy to a legatee to be paid at twenty-five, or between twenty-one and twenty-five, if the executors should think proper, and maintenance in the mean time, with a limitation over, *in case the legatee should not receive or dispose of it by will or otherwise in his lifetime*, it was to return and be paid to the heir in tail. The legatee having attained twenty-five the legacy vested in him absolutely; and it was held by Sir Thomas Plumer, M.R., that the limitation over was void. "If," said his Honor, "the will gives the absolute property, the right of disposing of it, or its devolution upon his representatives, would follow as a matter of course, unless there be something else which cuts down

the gift; nothing but that can prevent the legal consequences of property from ensuing The legatee acquired an absolute interest; and then comes the second part of the bequest, by means of which you must endeavour to get it back again; you must say, that if he does not dispose of it, it is to return from him: but I do not recollect any instance of a will, where an absolute property is first given, with a condition that if the party does not make use of it, it shall go over. But it was necessary to argue it to that extent. This differs from a power, and a remainder over in default of its exercise: the right of disposing of the legacy is given him, not *in terminis*, but as a consequence of property. How does he acquire the power? It is not given as a power, but follows from the property being his. The testator assumes that he would have a right to it at twenty-five; therefore, if he should have received it, and not have disposed of it, the capital is *solido* being his property, and remaining in his hands, was to go over to another. But if you give absolute property to a person, you cannot subject it for his life to a proviso, that if he does not spend it, his interest shall cease. One of the consequences would be, that if he had not spent it, and were to die indebted to any amount, his creditors would be excluded from it. It is quite a novel attempt to separate the devolution of property from the property itself." See also *The Attorney-General v. Hall*, 1 J. & W. 158, n., and the cases there cited; *Green v. Harvey*, 1 Hare, 428; *Watkins v. Williams*, 3 Mac. & G. 622; *In re Yalden*, 1 De Gex, Mac. & Gord. 53.

Upon the same principle where an *absolute* interest in property is vested in any person, or in trustees for him, it cannot be exempted from the ordinary incidents to property, viz. liability to the debts of the owner, and to the transfer, which by operation of law takes place, either on his bankruptcy or insolvency. *Graves v. Dolphin*, 1 Sim. 66; *Rochford v. Hackman*, 9 Hare, 475.

Although there be only a limited interest, as for life, given to a man, even if there be express words, that the income is to be payable into his hands or to his order and receipt only, and that it is not to be assignable by way of anticipation, it may nevertheless be assigned either by the tenant for life himself or by operation of law, as on his bankruptcy or insolvency; for property cannot be given for life any more than absolutely, without the power of alienation being incident to the gift. The leading case upon this subject is *Brandon v. Robinson*, 18 Ves. 429: there the testator gave to trustees all his real and personal property upon trust to sell, and to divide or otherwise apply the produce to the use of his children; but with respect to the share and interest of his son Thomas Goom he directed its investment during his life, and that the dividends, interest and produce thereof, as the same became due and payable, should be paid by them from time to time

into his own proper hands, or on his own proper order and receipt, subscribed with his own proper hand, to the intent the same should not be grantable, transferable or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease the principal of such share, together with the dividends and interest, and produce thereof, should be paid and applied by his trustees unto and amongst such person or persons as in a course of administration would become entitled to any personal estate of his said son Thomas Goom, as if the same had been personal estate belonging to him and he had died intestate; and Lord Eldon, C., overruled a demurrer put in by the trustees to a bill filed by the assignees, claiming the interest of the bankrupt in the trust property. "There is no doubt," said his Lordship, "that property may be given to a man *until he shall become bankrupt*. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life estate, neither the man nor his assignees can have it beyond the period limited.

"In the case of *Foley v. Burnell* (1 Bro. C. C. 274), this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and, as I thought, admitted, that if the property was given to the sons it must remain subject to the incidents of property, and it could not be preserved from the creditors, unless given to some one else.

"So the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands and upon her receipt only; yet this Court always said she might dispose of that interest and her assignee would take it; as, if there was a contract entitling the assignee, this Court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before *Miss Watson's Case* that these words 'not to be paid by anticipation,' &c., were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her as incident to property, which, being a creature of equity, she could not have at law; but, as, under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavoured to prevent that by imposing upon the trustees the necessity of paying to her from time

to time, and not by anticipation; reasoning thus;—*that equity making her the owner of it, and enabling her as a married woman to alien, might limit her power over it*; but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.

“This is a singular trust. If upon these words it can be established that he had no interest until he tenders himself personally to the trustees to give a receipt, then it was not his property till then; but if personal receipt is in the construction of this Court a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it could not be assets for his debts. It clearly would be so.

“Next, is there in this will enough to show, that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent *that, it must be given to some one else*; and unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest capable of being parted with. The principal at the death of the bankrupt will be under quite different circumstances. The testator had a right to limit his interest to his life, giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator, as if it was the son's personal estate, but as the gift of the testator.”

Even although there may be a trust for the maintenance of a man, and his trustees have a discretion as to the mode in which the income is applicable for his benefit, the assignees in bankruptcy, or under the Insolvent Debtors Act, will be entitled to the property. Thus in *Graves v. Dolphin*, 1 Sim. 66, where a testator gave his real and personal estates to trustees, upon trust to pay an annuity of 500*l.* to his son for his life, for his personal maintenance and support, and that it should not be subject to his debts, engagements, charges or incumbrances, and should from time to time, as it should become due, be paid over into the hands of his son only, and not to any other person, and that his son's receipt only should be a sufficient discharge; on the bankruptcy of the son, it was held by Sir John Leach, V. C., that his assignees were entitled to the annuity.

In *Snowdon v. Dales*, 6 Sim. 524, a person assigned 800*l.* to trustees in trust, during the life of the assignor's stepson, or such part thereof *as they should think proper; and at their will and pleasure, but not otherwise*, or at such other time or times, and in such sum or sums, portion or portions, as they should judge proper and expedient, to allow and pay the interest into the proper hands of the stepson, or otherwise if they should think fit, in procuring for him diet, lodging, wearing apparel and other necessities,

but so that he should not have any right, title, claim or demand in or to such interest, other than the trustees should in their or his absolute and uncontrolled power, discretion and inclination, think proper or expedient, and so as no creditor of his should or might have any lien or claim thereon in any case, or the same be in any way subject or liable to his debts, disposition or engagements; and it was declared that after his death the 800l., and all savings or accumulations of interest, if any, should be in trust for his children, and if he should have no children then to the persons therein named. Upon the bankruptcy of the stepson it was held by Sir L. Shadwell, V. C., that, as upon the proper construction of the instrument the trustees were not enabled to withhold and accumulate any portion of the interest during the life of the stepson, his assignees were entitled to his life interest. See also *Green v. Spicer*, 1 Russ. & My. 395; *Piercy v. Roberts*, 1 My. & K. 4; *Younghusband v. Gisborne*, 1 Coll. 400; *Lord v. Bunn*, 2 Y. & Coll. C. C. 98; sed vide *Twopeny v. Peyton*, 10 Sim. 487.

Where property is settled upon trust for the maintenance and support of a man and his wife and children during his life, the assignees of the husband will be entitled to what remains after the allowance of a proper maintenance for the wife and children (*Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare, 185; *Wallace v. Anderson*, 16 Beav. 533). The same result will follow where a life interest is made to cease upon the bankruptcy or insolvency of the cestui que trust, and the income is made payable for the maintenance and support of himself and his wife and family. *Lord v. Bunn*, 2 Y. & Coll. C. C. 98; *Rippon v. Norton*, 2 Beav. 63; sed vide contra, *Godden v. Cromhurst*, 10 Sim. 642, which on the whole may be considered as overruled.

It may be here mentioned that the right of those who take in substitution for the husband's life estate, on his becoming insolvent, arises on his actual discharge under the Insolvent Debtors Act. The income of the property therefore, until his discharge, will belong to his assignees, and after that time, they will take whatever beneficial interest the husband may have. *Lord v. Bunn*, 2 Y. & Coll. C. C. 98.

The principle upon which these cases proceed is that the policy of the law does not permit property to be so limited as that it *shall continue in the enjoyment of the debtor, notwithstanding* his bankruptcy or insolvency.

In *Twopeny v. Peyton* (10 Sim. 487), a testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had *become bankrupt and insane*, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund at such times in such proportions and in such manner for the maintenance and support of her nephew, and for no other purpose whatsoever, as they in their

discretion should think most expedient. It was held by Sir L. Shadwell, V. C., that the nephew's assignees were not entitled to any portion of the provision made for him. This case was probably well decided upon the ground of the previous bankruptcy and incapacity of the nephew, but the reasoning upon which the Vice-Chancellor attempts to support it, by showing that the trustees had a discretionary power to apply the income, and then only for his maintenance and support, is contrary to the principle upon which many cases have been decided, even by the Vice-Chancellor himself, and is clearly untenable. See *Younghusband v. Gisborne*, 1 Coll. 400.

The principle would not be violated by a provision limiting over or making to cease a life interest, on an attempt at alienation by, or on the bankruptcy or insolvency of, the person to whom it is given, inasmuch as it is not intended there that the debtor should enjoy the property after his attempt at alienation, or after his bankruptcy or insolvency.

This was laid down by Lord Eldon in *Brandon v. Robinson*, and it has accordingly been clearly held, that a limitation over, or a proviso determining a life interest, on bankruptcy, is valid. *Lockyer v. Savage*, 2 Stra. 947; see *Wilkinson v. Wilkinson*, 3 Swanst. 522.

If alienation be prohibited under a proviso determining a life interest in general terms, and so as not to be confined to voluntary alienation, by the act of the tenant for life, it will create a forfeiture on his bankruptcy, although it be a compulsory alienation. Thus in *Dommett v. Bedford* (3 Ves. 149; 6 T. R. 684), a testator gave an annuity to his nephew for life, and directed that the same should be paid to *him only*, and that a receipt, under his own hand and no other, should be a sufficient discharge for the payment thereof, his intent being that the said annuity or any part thereof should *not on any account be alienated* for the whole term of his life or for any part of the said term; *and, if the same should be so alienated*, the said annuity should immediately thereupon cease and determine. The nephew having become bankrupt, it was held by the Court of Queen's Bench, that the annuity thereupon ceased and determined.

This construction of the proviso will be the more readily adopted, when, in the words of gift, expressions are made use of which show that the interest to the party was to cease, whenever it could be no longer the subject of his immediate personal enjoyment. See *Cooper v. Wyatt*, 5 Madd. 482.

Where, however, the terms of the proviso are such as to be only applicable to acts of alienation by the tenant for life himself, no forfeiture will be created by bankruptcy when the proceedings are commenced by the creditors, and his interest consequently will pass to his assignees. Thus in *Lear v. Leggett*, 1 Russ. & My. 690, where a testator gave stock upon

trust for his son for life, with a proviso that his life estate should not, nor should any part thereof, be subject to any alienation or disposition by sale, mortgage or otherwise in any other manner whatsoever, or by anticipation of the receipt; and in case he should charge or attempt to charge, affect or incumber the same, or any part or parts thereof, then that any such mortgage, sale or other disposition or incumbrance, so to be made on his life annuity, interest or provision, should operate as a complete forfeiture thereof, and of all benefit therein, during the remainder of his life, and the estate should devolve as if he were then actually dead. It was held by Lord Lyndhurst, C., affirming the decision of Sir L. Shadwell, V. C. (2 Sim. 479), that the bankruptcy was not a forfeiture, and, consequently, that the bankrupt's life interest passed to his assignees. "Here," said his Lordship, "the clause of forfeiture applied only to the prohibition against the acts of the parties themselves; 'in case he shall charge or attempt to charge, affect or incumber the same,' then the property was to go over. The prohibition in *Dommett v. Bedford* was expressed in much more general and comprehensive terms, and might well be construed to extend to alienations by act of law; yet even there the point had been considered doubtful." See also *Wilkinson v. Wilkinson*, Sir G. Coop. 259; 3 Swanst. 515; *Whitfield v. Prickett*, 2 Keen, 608.

The result will be the same, where proceedings under the Insolvent Debtors Act are commenced by a creditor (*Pym v. Lockyer*, 12 Sim. 394; see 1 & 2 Vict. c. 110, s. 36), or where a sale takes place under process of outlawry against the annuitant or tenant for life, inasmuch as an outlawry is a compulsory process on the part of the crown, on the contumacy of a subject; and is no positive act of the party. *Rea v. Robinson*, Wightw. 386.

Where, however, proceedings in such a case are taken by the debtor in order to avail himself of the provisions of the Bankrupt (12 & 13 Vict. c. 106, s. 70) or Insolvent Debtors Act (1 & 2 Vict. c. 110); then as it is his own act, a cesser or forfeiture of his interest will take place, and, consequently, his assignees can take nothing. *Shee v. Hale*, 13 Ves. 404; *Brandon v. Aston*, 2 Y. & Coll. C. C. 24; *Churchill v. Marks*, 1 Coll. 441; *Martin v. Margham*, 14 Sim. 230; *Rochford v. Hackman*, 9 Hare, 475.

And a forfeiture may be made to take place on bankruptcy or insolvency in the life of the testator. *Yarnold v. Moorhouse*, 1 Russ. & My. 364.

It is not necessary that there should be a limitation over in order to determine a life interest, as an express declaration that the life estate shall cease will have the same effect. *Dommett v. Bedford*, 6 T. R. 684, and see *Rochford v. Hackman*, 9 Hare, 481, where Sir George Turner, V. C., made the

following important observations:—"The true rule I take to be this: the Court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect that intention from the whole will, looking to the primary disposition for the purpose of seeing to what extent the interest is given, and to the ulterior disposition for the purpose of seeing to what extent and in what events the primary disposition is defeated. If, on the one hand, the Court, upon this examination, finds that there is a limitation over, and that it meets the event which has occurred, it is plain that the testator did not intend the life interest to continue in that event, and it ceases accordingly; but if, on the other hand, the Court upon the examination finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues as in *Lear v. Leggett* (1 Russ. & My: 690) and *Pym v. Lockyer* (12 Sim. 394). This view of the cases appears to me to remove all difficulty upon them, and it falls within the case of *Dommett v. Bedford* (6 T. R. 684), in which the life interest was held to cease upon the proviso for cesser without any gift over. I think, indeed, it would be difficult to hold that any greater effect can be due to the limitation over than to the express declaration of the testator that the life interest should cease. Some observations which fell from Lord Eldon upon this question, in the leading case of *Brandon v. Robinson* (18 Ves. 429), appear to me to have been to some extent misapprehended, and I will venture, therefore, to make some few observations upon that case. Lord Eldon, in that judgment, first observes, that a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien; and the distinction between the two cases is obvious. In the former case the disposition could not possibly endure beyond the bankruptcy. In the latter, it would, if the law did not allow the proviso, or if the proviso was not couched in terms calculated, in the events which happened, to defeat the life interest; but I do not understand Lord Eldon to say, that the law does not allow the proviso. On the contrary, he expressly says, that if the proviso be so expressed as to amount to a limitation reducing the interest short of a life estate, neither the man nor his assigns can have it beyond the period limited; and we have here, therefore, his distinct opinion, that upon a proviso so expressed the life interest should cease. He then passes to the case of *Foley v. Burnell* (1 Bro. C. C. 274), and to the old form of trusts for the separate use of married women, for the purpose of showing that the power of disposition accompanied the interest, unless an available restriction was imposed; and he then proceeds to the particular case which he

had under his consideration, and, having first shown that the life interest was the property of the bankrupt, goes on to inquire whether there was enough in the will to show that it would not be assigned under the commission of bankruptcy; on which he observes, that, 'to prevent that, it must be given to some one else;' meaning, as I understand the judgment, not that in all cases there must be a gift over to prevent the assignees from taking; but, that under the provisos of that particular will, the assignees must take in the absence of such a gift over; as was clearly the case according to the tenor of the previous part of his judgment, there being no proviso determining the life interest: and that this was Lord Eldon's meaning is, I think, apparent both from what precedes and what follows upon the passage in question; for in what precedes he refers to the provisions of the whole will, and in what follows he adverts to the question whether the restrictions contained in the will could be construed into a limitation giving the interest to the residuary legatee. Lord Eldon's judgment in *Brandon v. Robinson* does not, therefore, appear to me to go to the extent of deciding that in all cases there must be a gift over in order to determine the life interest."

Where there is a provision for determining a life interest upon an assignment of *futurs* income, no forfeiture will take place upon an assignment of *arrears* of interest or income. Thus in a recent case, trustees were by a will directed to pay the income of a fund to the testator's nephew, for his life, weekly, monthly or quarterly, as they should think fit, with a declaration that if the nephew should anticipate, assign or otherwise incur the income, or attempt to do so, the trust should be void, and the trust fund fall into the residue. Eighteen months after the testator's death, and before any payment had been made to the nephew, he assigned as a security (so far as he lawfully could, without creating a forfeiture of his interest in the income of the legacy) all money *due* to him on account of the income, but not any future income: it was held by the Lords Justices of the Court of Appeal that the assignment was valid. *In re Stulz's Trusts*, 4 De Gex, Mac. & G. 404.

Although, as we have seen, a *life* interest may be given to a person by *another*, with a limitation over on his alienation, bankruptcy or insolvency, he cannot, even upon his marriage, settle his own property so as to go over on any of those events. Thus in *Phipps v. Lord Ennismore* (4 Russ. 131), a tenant for life of certain lands, with power of limiting a jointure to his wife, executed a settlement on his marriage, by which he demised the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin money during the coverture, and limited a jointure to her after his death. On the

same day the same parties executed another instrument, by which the tenant for life covenanted not to sell or incumber the lands comprised in the term; and it was declared, that if he should at any time sell or incumber them, or attempt so to do, the trustees of the term should receive the rents and profits, and apply them, as they might think fit, for the maintenance and support of the tenant for life, or his wife or children or issue. It was held by Lord Lyndhurst, C., affirming the decision of Sir L. Shadwell, V. C., that the covenant and proviso were fraudulent and void as against a subsequent incumbrancer of the life estate. "Can it be contended," said his Lordship, "that the tenant for life can enter into a covenant—a private deed—with his own trustees, that he shall not incumber his interest on the property, and, that if he does incumber it—if, for instance, he sells it for valuable consideration—the effect is to be that the purchaser shall not be entitled to possess what he has bought, but that the tenant for life himself, subject to the discretion of his trustees and under their direction, shall continue to enjoy the rents and profits as if the alienation had not taken place? In point of law such a transaction cannot be sustained.

"The only question which admits of doubt is whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands, that the parties to the deed did not contemplate a fraud, but the transaction is in its very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and that event only, was the instrument in question to have operation. In point of law the deed cannot be sustained."

In *Higinbotham v. Holme* (19 Ves. 88), where, on the marriage of a man not indebted, nor intending to enter into trade, he executed a settlement of freehold estates of inheritance, and leaseholds for lives, to the use of himself for life unless he should embark in trade, and in the life of his wife become bankrupt, and from and after his decease or bankruptcy, to secure an annuity for the separate use of his wife, free from his debts or control, and subject thereto for his heirs, executors, &c., the husband afterwards engaged in trade and became bankrupt; it was held by Lord Eldon, C., affirming the decision of Sir W. Grant, M.R., that the provision for the wife was void. "Though undoubtedly," said his Lordship, "an annuity might have been provided by the settlement for the wife in all events, yet it is not competent to a party, giving a consideration for a contract, that is a direct fraud upon the bankrupt laws, to have the benefit of it." See also *In re Murphy*, 1 S. & L. 44; *In re Meaghan*, Ib. 179; *Ex parte Hodgson*, 19 Ves. 206; *Ex parte Hill*, 1 Cooke's Bank. Law, 291; *Ex parte Bennet*, Ib. 293.

As, however, the property of the wife may on marriage be limited so as to go over, on the bankruptcy or insolvency of her husband, he may settle a fund of his own, equivalent to what he may have received from his wife, to go over on either of those events taking place, as it would be considered in effect as a settlement of a fund belonging to the wife. *Ex parte Cooke*, 8 Ves. 353; *Higginson v. Kelly*, 1 B. & B. 252; *Ex parte Verner*, Ib. 260; *In re Meaghan*, 1 S. & L. 179; sed vide *Ex parte Hill*, 1 Cooke, Bank. Law, 291; and *Ex parte Hodgson*, 19 Ves. 208.

Where property is settled to the separate use of a married woman, she may, but *during coverture only*, be restrained from aliening by the usual clause against anticipation; but, as Lord Eldon well observes in *Brandon v. Robinson*, this does not take away any power given by the law as incident to property, inasmuch as the enjoyment of property settled to the separate use of a married woman is a mere creature of equity, unrecognized at law; and as equity has given it to a married woman, equity may also, without interfering with the principles of law, limit her power over it. See *Hulme v. Tenant*, 1 L. Cas. Eq. 324, and note.

The restriction upon anticipation is only valid during coverture, and is equally, as in the case of a gift to a man, invalid, whilst a woman is sole, either previous to marriage or during widowhood, though the restriction, unless limited to a particular marriage (*Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149; *In re Gaffee's Settlement*, 1 Mac. & G. 541, overruling *S. C.* 7 Hare, 101), will reattach upon a subsequent marriage.

The whole law upon the subject is laid down by Lord Langdale, M. R., in the leading case of *Tullett v. Armstrong* (1 Beav. 32), as follows:—"That if a gift be made to a woman to her sole and separate use, without power to alienate, she has during coverture the present enjoyment of an unalienable estate, independent of her husband. In either of these cases she has, when discover, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the woman is discover, the separate estate, whether modified by restraint or not, is suspended, and has no operation, though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate, of which it is only a modification. To say that the restriction exists, is saying no more than that the separate estate is so modified. The donor, in giving the woman, when married, some of the faculties of a feme sole, has withheld the power of alienation, under the terms of the gift; and by the aid of this Court the woman is a feme sole, as to the present enjoyment of the property, but no further; measuring her faculty by the terms of the gift, she is not a feme sole as to the disposition of her property

in anticipation of her intended provision. If there be no separate estate, there can be no such restriction as that which is now under consideration. The separate estate may, and often does, exist, without the restriction, but the restriction has no independent existence; when found, it is as a modification of the separate estate, and inseparable from it." See *S. C.* affirmed on appeal, 4 My. & C. 405.

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to arise on failure of a prior interest, may take effect, although mode in which that event has happened has not been precisely provided for, 706.

takes effect, though the event on which it is to take place is in the death of a child which a woman, by mistake, is supposed to be enceinte of, 707.

or in the event of the testator having only one child, although there be no child, *ib.*

or in the event of a prior object of a gift not performing a certain act, although he never came into existence, 709.

secus, where prior gift fails by reason of a lapse, 710.

EXECUTORY TRUSTS.

distinction between, and executed trusts, 503.

rule in *Shelley's Case*, how far applicable to, *ib.*

cross remainders may be readily implied in, 534, 536.

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FEE SIMPLE ABSOLUTE AND INDETERMINABLE.

definition of, 585.

owner of, has complete power of voluntary alienation, over, *ib.*

condition in restraint of power of alienation void, *ib.*

except in case of property settled to separate use of a married woman, *ib.*

licence of crown requisite for corporation to take land, *ib.*

unless it has authority to do so by act of parliament, *ib.*

devise to charity of land in, void, when, *ib.*

as to voluntary alienation of, on bankruptcy of owner of, *ib.*

or on his insolvency, *ib.*

voluntary alienation by contract to sell, *ib.*

in a deed, words of inheritance must be used to confer, 586.

as to a man and his heirs for ever, *ib.*

a life interest only will be given by a conveyance to a man and his assigns for ever, *ib.*

or to a man or his heirs, *ib.*

and his successors, *ib.*

to two persons et hæredibus, omitting suis, *ib.*

FEE SIMPLE, &c.—continued.

to one man et hæredibus, omitting suis, fee passes, 586.

conveyance to a man and his heir, effect of, *ib.*

word "heirs" in latter part of sentence referred to preceding part of sentence, when, *ib.*

words of inheritance not necessary to pass in case of fine, when, *ib.*

or of a recovery, 587.

or of a release in certain cases, *ib.*

passes by words of reference, *ib.*

to corporations by the word "successors," *ib.*

but it is not essential in conveyance to corporation aggregate, *ib.*

king takes by deed enrolled, without the words "successors or heirs," *ib.*

given by what terms, according to the rule in *Shelley's Case*, *ib.*

conveyance in fee directed in equity, though contract of purchase does not contain words of inheritance, *ib.*

in a *will* (previous to the Wills Act), fee passes without words of limitation, if intention be to confer, 588.

if there be no words of limitation, life interest passes only by a devise of messuages, houses, lands and tenements, *ib.*

or manors, *ib.*

perpetual advowsons, *ib.*

or even hereditaments, *ib.*

does not pass by mere introductory words of intention to dispose of all the testator's estate, *ib.*

or by devise of express life interest in another part of the will, *ib.*

or by a gift to the heir-at-law of a previous life interest, *ib.*

or a legacy, *ib.*

passes by words equivalent to words of limitation, 589.

as to a man and heirs, *ib.*

or his heirs, *ib.*

or his executors, *ib.*

and his house or family, *ib.*

stock, *ib.*

for ever, *ib.*

and his assigns for ever, *ib.*

but a devise to a man and his assigns only, gives a life interest, *ib.*

passes without words of limitation, by direction to devisee to pay testator's debts or legacies, *ib.*

or any sum in gross, *ib.*

or annuities, *ib.*

though charge small in proportion to the value of the estate, *ib.*

or being contingent, may never arise, *ib.*

secus, where there is no personal duty imposed on devisee to make such payments, *ib.*

FEE SIMPLE, &c.—continued.

- and land is merely devised after or subject to them, 590.
- or where there is an express estate for life, *ib.*
- or an estate tail in express terms, *ib.*
- or by construction of law, *ib.*
- conferred without words of limitation by a gift over in fee or for life, on devisee dying before a particular age, *ib.*
- although another contingency be coupled with it, *ib.*
- devise over, without words of limitation, in place of a previous devise in fee, will not confer, *ib.*
- will be conferred upon cestui que trust, without words of limitation, when trustees take, *ib.*
- and in the converse case upon trustees, 591.
- will pass by words descriptive of fee, *ib.*
- as by a devise to a man in fee simple, *ib.*
- or by a devise of all "my estate," *ib.*
- or "estates," *ib.*
- though referred to as being at, in or of a particular place, *ib.*
- or known by a particular name, *ib.*
- or in the occupation of another person, *ib.*
- or of the testator himself, *ib.*
- though word estate may be used in the same will, in giving an express life interest, *ib.*
- the use of the word "estate" in the introduction to will, will not pass fee, *ib.*
- unless made use of so as to comprehend subsequent devise, *ib.*
- passes by reference to the word estate previously used, as by the word "same," *ib.*
- not by a mere gift of "above devised lands," *ib.*
- though it may by reference to former description, not capable of carrying the fee, 592.
- but it may be cut down by the context, *ib.*
- passes by the devise of the rents to a person, his heirs and assigns, *ib.*
- passes by words equivalent to the word "estate," *ib.*
- as "inheritance," *ib.*
- "real effects," *ib.*
- "property," *ib.*
- all "right and title," *ib.*
- or "interest," *ib.*
- will pass by the word "reversion," *ib.*
- or "remainder," *ib.*
- and seem by the words "part or share," *ib.*
- clearly, if used in conjunction with the word "estate," *ib.*
- will pass by words showing that devisee is to have complete power over property, 593.

FEE SIMPLE, &c.—continued.

- as a devise to a man "to give and to sell," 593.
- to give away at death to whom he pleases, *ib.*
- to be at his discretion, *ib.*
- but a devise "to be freely possessed and enjoyed," held only to give estate for life, *ib.*
- words conferring an estate tail in freeholds, confer fee simple conditional in copyholds, not entailable by custom, *ib.*
- on birth of issue, fee simple conditional becomes absolute, *ib.*
- result is the same in case of inheritance of personal character, *ib.*
- conferred by rule in *Shelley's Case*, *ib.*
- passes under section 28 of the Wills Act, without words of limitation, *ib.*
- unless a contrary intention appear by the will, 594.
- section 28 of the Wills Act not applicable to an interest created by will de novo, *ib.*
- gift of an annuity de novo, without words of limitation, is merely a life annuity, *ib.*
- secus, in the case of a rentcharge in fee simple, or fee farm rent vested in the testator, *ib.*
- contrary intention not shown by the absence of words of limitation, after their use in another part of the will, *ib.*
- liable to curtesy and dower, *ib.*
- to debts by specialty and simple contract, 603.
- except in case of equitable assets, debts by specialty have priority, *ib.*
- debts by specialty have now precedence in payment out of an equity of redemption, 604.
- liable to judgment debts, crown debts and *lis pendens*, *ib.*
- See DESCENT.*

FEE SIMPLE DETERMINABLE.

- Divisible into *the Fee Simple conditional or Mortgage*, 604.
- becomes absolute at law, on nonpayment of money on a certain day, *ib.*
- is redeemable in equity, *ib.*
- right of redemption cannot be given up at the time of the mortgage, *ib.*
- or confined to a particular time or class of individuals, *ib.*
- except perhaps in the case of a family arrangement, *ib.*
- but mortgagor may stipulate for right of pre-emption on sale, 605.
- as to the legal estate and rights of the mortgagee, *ib.*
- as to the estate of the mortgagor, *ib.*
- Fee Simple qualified or derived out of an Estate in Fee*, *ib.*
- determinable upon the happening of some event, *ib.*
- will continue for ever, if the event do not happen, to determine it, *ib.*
- but if event must happen, it will be determinable, 606.
- unless person entitled in remainder or reversion release his interest, *ib.*

FEE SIMPLE DETERMINABLE—*continued.*

executory devise is of the same nature, 606.

owner of determinable fee cannot convey greater interest, *ib.*

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FINE.—*See ESTATE TAIL.***FINES.**

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FINES AND RECOVERIES ACT.

does not extend to estate of tenant in tail after possibility of issue extinct, 37.

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FIXTURES.

right of tenant from year to year to, 18.

person with limited interest erecting, entitled to remove, when, 63.

FORFEITURE.

of lands for treason, 636.

only of estates of which person was seised on commission of crime, *ib.*

effect of pardon of crown, 637.

did not remove corruption of blood of persons born at the time of attainder, *ib.*

secus, as to those born afterwards, *ib.*

corruption of blood formerly removed by act of parliament, *ib.*

of trust estates for treason, 638.

and the crown may redeem a mortgage on the land, *ib.*

lands vested in trustees not liable to, for other felonies, *ib.*

lands of which a man is seised jure uxoris liable only during coverture, 639.

formerly liable to, for treason or felony of trustee or mortgagee, *ib.*

law now altered, *ib.*

except as to beneficial interest of trustee or mortgagee, *ib.*

crown taking by, is subject to engagements and incumbrances of owner, *ib.*

to dower and curtesy, when, 640.

personal estates liable to, to crown for treason or felony of owner, *ib.*

except perhaps merely contingent interests, *ib.*

even though vested in trustees, *ib.*

property accruing to person undergoing punishment liable to, to crown, *ib.*

how far assignment of goods and chattels by felon before conviction is valid, *ib.*

FORFEITURE—*continued*.

semble, that intermediate conveyance of lands of inheritance void, 641.

clearly so if made for the purpose of eluding the, *ib*.

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may take advantage of, in case of personalty without office found, *ib*.

in case of real estate office must be found, *ib*.

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FREEBENCH.

provision in lieu of dower will bar in equity, 49.

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conventional, 30.

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See CURTESY; DOWER; ESTATE FOR LIFE; TENANT IN TAIL

AFTER POSSIBILITY OF ISSUE EXTINGT; TENANT POUR AUTRE

VIE.

GAVELKIND.

by custom of, husband by the curtesy entitled to a moiety of wife's land, 42.

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who entitled to, 64.

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HUSBAND.

seised in right of his wife holding over, 9.

HUSBAND AND WIFE.

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IMPLICATION.

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or in devises by wills, *ib*.

not regularly in conveyances of estates at law, *ib*.

life estate by, from gift over upon death of person, *ib*.

devise to heir-at-law after death of another person gives latter a *life estate by*, *ib*.

IMPLICATION—*continued.*

- secus, where the devisee is not heir, 521.
- arises though heir may not be described as such, 522.
- semble, he must be heir at the making of the will, *ib.*
- has been raised where devise over has been to several, one of whom was heir, *ib.*
- not raised, where express life interest is given in part of the lands, *ib.*
 - or where there is a residuary devise, 523.
- a life estate by, arises on devise to the survivor of several persons, and the child or children of those who died, 524.
 - or where income, given to persons jointly, is limited over on the death of the survivor, *ib.*
- of life estate, by bequest of term of years after death of another, *ib.*
 - unless where the residue is disposed of, 525.
- of life estate, will not arise by appointment of a sum after the death of a person, if there is a gift over in default of appointment, *ib.*
- no estate arises by, upon a person attaining a certain qualification, by a gift over on his not attaining it, *ib.*
 - unless perhaps on special grounds, 526.
- estate tail by, after estate given to a person indefinitely or for life, on limitation over upon a general failure of issue, *ib.*
- a devise over is essential in order to raise estate tail by, 527.
- principle of this rule of construction, *ib.*
- what words import a general failure of issue, *ib.*
- heir to whom no express estate is given will take estate tail by a devise over on his death without issue, *ib.*
- secus, in the case of a stranger, 528.
- and gift over would be too remote, *ib.*
- of an estate tail, when prevented by the referential construction, *ib.*
- will arise more readily with regard to real than personal estate, *ib.*
- in the case of realty, gift over in default of such issue when construed as referential, 528, 529.
 - or for want of such issue, *ib.*
 - or such issue or issue as aforesaid, *ib.*
- estate tail not conferred by words importing a failure of issue when referential to a single child, *ib.*
 - or to children, 529.
 - or to sons or daughters, *ib.*
 - and whether the devise be in fee or in tail male, *ib.*
- devise over, on failure of issue, following a devise to children in fee, or in tail, referential, *ib.*
- so as to realty where devise over is "without leaving issue," *ib.*
 - unless different construction required by context, *ib.*
- where after a devise to ancestor there is a limitation to only a limited number of a class of children a gift over in default of issue, not being referential, confers estate tail on ancestor, *ib.*

IMPLICATION—*continued*.

where express estate tail is given to ancestor, followed by a limitation in default of issue, he takes estate tail by implication expectant upon, 530.

rule as stated by Lord Cottenham in *Ellicombe v. Gompertz* (3 My. & Cr. 151), *ib.*

of estate tail more readily raised for parent, where children take only life interests, *ib.*

with regard to personalty after a life interest to parent, a bequest over if parent died "without issue" is referential, *ib.*

even where the bequest is to a limited number of children, *ib.*

à fortiori, where prior gift is to "issue," 531.

or a gift over is "in default of such issue," *ib.*

words importing a general failure of issue, how construed under the new Wills Act, *ib.*

no gift by, to children, where after a bequest to a person there is a limitation over on his death without child or children, *ib.*

and the construction is the same in case of pecuniary legacy and of a residue, *ib.*

cross remainders in tail when persons take by, 532.

cross remainders may be raised both by deed and will, *ib.*

but only by express words in legal limitation in deeds, *ib.*

in will may be raised by implication, *ib.*

as when after devise to daughters in fee there is a limitation over, in case they die without issue, *ib.*

or in default of issue males, 533.

or when after gift to several as tenants in common in tail, there is added, "with remainder" to another, *ib.*

but not if term "reversion" be used, *ib.*

may be implied between more than two persons, *ib.*

presumption of cross remainders more favoured between two persons only, *ib.*

cross remainders implied in executory trusts, though there are express cross limitations among the same objects, 534.

or though there be an express direction to insert them among other objects, *ib.*

secus, in the case of ordinary devises, *ib.*

though Wigram, V. C., in *Vanderplank v. King* (3 Hare, 20), thought they might, *ib.*

of cross remainders not rebutted, by limitation to persons "and the heirs of their respective bodies," 335,

or to "the several and respective issues of their bodies," *ib.*

of cross remainders among several stocks or branches of issue, 536.

and though one of the branches took an estate tail and the other a life interest the descendants took estates tail, *ib.*

of cross remainders in the case of executory trusts, *ib.*

IMPLICATION—continued.

in marriage articles, 536.

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not raised of cross executory limitations, after absolute gift of property, with a limitation over in certain events, *ib.*

of equitable estate does not necessarily arise coextensive with legal estate, 537.

of estates from a recital in a will that a particular disposition has been made, *ib.*

or of a legacy, 538.

but legacy not cut down by subsequent erroneous recitals in the same will, *ib.*

or in a codicil, *ib.*

intention of testator to make up a certain sum, not defeated by a miscalculation of a former annuity or legacy, *ib.*

person may take estate by being termed heir by the testator, *ib.*

former clear gift not revoked by a mere mistake in recitals in the same instrument or in a codicil, *ib.*

but a devise in ambiguous terms explained and controlled by subsequent recitals, *ib.*

no estate by, when there is a recital of an interest being possessed independent of the will, *ib.*

no interest to wife by, from devise and bequest, subject to her dower and thirds, 540.

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INTEREST.

payment of, by tenant for life, 59.

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See TENANT FOR LIFE.

ISSUE.

general failure of, previous to 1 Vict. c. 26, denoted by gift over, "in default of issue," 556.

for want of issue, *ib.*

if "he die without issue," *ib.*

"without having issue," *ib.*

"before he has any issue," *ib.*

and as to realty by a devise over, on death, "without leaving issue," *ib.* though as to personality, the words "without leaving issue," meant issue living at the death, *ib.*

ISSUE—*continued.*

the words "in default of issue," may by context mean the same as "in default of leaving issue," 556.

gift over in default of issue of the testator confined to issue living at the death, 557.

effect, with regard to realty, of holding words to import a general failure of issue, *ib.*

effect, with regard to personalty, 558.

reason for the distinction in *Forth v. Chapman*, *ib.*

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As to Real Estate.

limitation over, on a person's death, under or above a particular age, without issue, will mean issue living at the death, *ib.*

but not a devise over in the event of issue dying under twenty-one, *ib.*
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unless ulterior limitations are for life only, 559.

restricted construction adopted where sum of money or legacy is to be paid by person entitled under executory gift, when, *ib.*

or where limitation over has been upon a person dying without leaving issue "on" or "at" his death, *ib.*

but not by the expressions "on or after," *ib.*

As to Personal Estate.

restrictive construction adopted after words importing a general failure of issue, by a gift over on death, under a particular age, without having, 560.

or by gift being prefaced by such words as "immediately after the decease," *ib.*

or "after the decease," *ib.*

or "at the death" of the first taker, *ib.*

not adopted in a devise "for want of issue male after him," *ib.*

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adopted where gift after general failure of issue to the survivor of several persons is personal to himself, *ib.*

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or is to take effect on the failure of issue of persons who shall be living at the time, *ib.*

or is made to a person living at the death of the person whose issue is mentioned, *ib.*

restricted meaning given to limitation over, by a power of appointing among issue, preceding a limitation over, upon death of appointee without, *ib.*

secus, where there is an express limitation to the issue in default of appointment, 561.

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ISSUE—*continued.*

- unless contrary intention appear by the will, 561.
- section 29 not applicable to cases previously not referring to a general failure of issue, *ib.*
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JOINT-TENANTS.

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- nature of estate of, *ib.*
- each of them seised per my et per tout, *ib.*
- may be in chattels, real and personal, *ib.*
- what is essential to create an estate in joint-tenancy, *ib.*
- Unity of interest, ib.*
 - demise to two persons, to one for life, to the other for years, does not make but tenants in common, *ib.*
 - reversion and freehold and inheritance in possession cannot be held by, *ib.*
 - joint-tenancy cannot exist between parties taking, some in a natural, others in a corporate capacity, 718.
- Must have unity of title, ib.*
 - must take by the same instrument, *ib.*
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 - estate must be vested in at the same time, *ib.*
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- As to unity of possession, ib.*
 - possession of one of, formerly that of all, *ib.*
 - law now altered, *ib.*
 - survivorship or jus accrescendi takes place amongst, *ib.*
 - may have a joint estate for term of their lives, and several inheritances, 719.
 - as where lands given to persons incapable of intermarriage and the heirs of their two bodies, *ib.*
 - secus, where lands are so given to persons already married or capable of intermarriage, *ib.*
 - estate of, not liable to curtesy or dower, 46, 720.
 - rentcharge not binding on survivors, 720.
 - but judgment now is, *ib.*
 - survivor not liable to extent of the crown for debt of deceased joint tenant, *ib.*
 - but will be bound by a lease, *ib.*
 - trustees always made, *ib.*
 - what words by deed will create estate in joint-tenancy, *ib.*
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JOINT-TENANTS—*continued.*

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or in fee, *ib.*

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whether conveyance be made to them, *ib.*

or a mere contract to sell, *ib.*

where purchase-money is advanced in unequal shares, survivor will be a trustee, *ib.*

persons advancing money jointly on mortgage at law are, *ib.*

but in equity, in whatever proportions they make the advance, they are tenants in common, *ib.*

joint mortgagees foreclosing considered in equity as tenants in common, *ib.*

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nor where real property is purchased for a joint undertaking, *ib.*

for partnership in trade or other dealing, *ib.*

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whether to individuals, *ib.*

or classes, *ib.*

as to next of kin, *ib.*

issue, *ib.*

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children, *ib.*

though devise be to children on attaining twenty-one, *ib.*

but in executory trusts equity leans to a tenancy in common, *ib.*

joint-tenancy not converted into tenancy in common by being connected by word "*also*" with previous devise of a tenancy in common, 723.

nor will accruing shares be held by tenancy in common because original shares are so held, *ib.*

nor will children be tenants in common who take by substitution for parents taking as tenants in common, *ib.*

severance of joint-tenancy, *ib.*

by operation of law, *ib.*

when one of several persons having interest for lives acquire the reversion by purchase, *ib.*

or by descent, *ib.*

JOINT-TENANTS—*continued.*

joint-tenancy destroyed by the devolution of all the shares on the survivor, 724.

by the act of the parties, *ib.*

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JOINT-TENANTS—*continued.*

- pour autre vie, 720.
- for their own lives, *ib.*
- or in fee, *ib.*
- except in case of husband and wife, *ib.*
- persons advancing purchase-money in equal shares take as, 721.
- whether conveyance be made to them, *ib.*
- or a mere contract to sell, *ib.*
- where purchase-money is advanced in unequal shares, survivor will be a trustee, *ib.*
- persons advancing money jointly on mortgage at law are, *ib.*
- but in equity, in whatever proportions they make the advance, they are tenants in common, *ib.*
- joint mortgagees foreclosing considered in equity as tenants in common, *ib.*
- jus accrescendi* not applicable amongst merchants and partners, *ib.*
- nor where real property is purchased for a joint undertaking, *ib.*
- for partnership in trade or other dealing, *ib.*
- considered personalty, when, *ib.*
- in marriage articles equity construes words which, at law, give a joint-tenancy as creating tenancy in common, *ib.*, 722.
- what words by *will* create a joint-tenancy, 722.
- a devise to two or more, *simplicitèr* of realty, *ib.*
- or a bequest of chattels, whether real or personal, *ib.*
- of money or a residue, *ib.*
- whether accompanied by a trust or not, *ib.*
- whether to individuals, *ib.*
- or classes, *ib.*
- as to next of kin, *ib.*
- issue, *ib.*
- family, *ib.*
- children, *ib.*
- though devise be to children on attaining twenty-one, *ib.*
- but in executory trusts equity leans to a tenancy in common, *ib.*
- joint-tenancy not converted into tenancy in common by being connected by word "also" with previous devise of a tenancy in common, 723.
- nor will accruing shares be held by tenancy in common because original shares are so held, *ib.*
- nor will children be tenants in common who take by substitution for parents taking as tenants in common, *ib.*
- severance* of joint-tenancy, *ib.*
- by operation of law, *ib.*
- when one of several persons having interest for lives acquire the reversion by purchase, *ib.*
- or by descent, *ib.*

JOINT-TENANTS—continued.

joint-tenancy destroyed by the devolution of all the shares on the survivor, 724.

by the act of the parties, *ib.*

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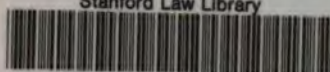
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